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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 356.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, PLAINTIFF IN ERROR,

vs.

ELECTA L. WATERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 9, 1885.

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1

CITATION.

The United States of America to Electa L. Waters, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a Writ of Error, filed in the Clerk's Office of the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio, wherein The Union Mutual Life Insurance Company, of Maine, is Plaintiff in error, and you are Defendant in error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin Welker, District Judge of the U. S. for the Northern District of Ohio, sitting in the Circuit Court this 12th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

M. WELKER,
Dist. Judge U. S. for the N. D. O.

RETURN ON CITATION.

NORTHERN DISTRICT OF OHIO. } ss.

On the 19th day of May, 1885, at Cleveland, Ohio, I delivered to the within named Electa L. Waters a true and duly certified copy of the within citation.

W. F. GOODSPEED, *U. S. Marshall.*
By JOHN ODELL, *Deputy.*

2

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Ohio—Eastern Division Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, the Judges thereof between Electa L. Waters and the Union Mutual Life Insurance Company of Maine, a manifest error hath happened, to the great damage of the said The Union Mutual Life Insurance Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record

and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of February in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.]

AUGUSTUS J. RICKS.
Clerk of the Circuit Court of the United States, for the Nor. Dist. of Ohio.

3

RETURN ON WRIT OF ERROR.

UNITED STATES OF AMERICA,
EASTERN DIVISION OF
NORTHERN DISTRICT OF OHIO.

I, Augustus J. Ricks, Clerk of the Circuit Court of the United States, within and for said District, do hereby certify that, in obedience to the command of the within Writ of Error, the Court has duly searched the record and proceedings of the said Court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at office, in the city of [SEAL.] Cleveland, this first day of April, A. D. 1885.

AUGUSTUS J. RICKS, *Clerk.*

4 Be it remembered that heretofore, to wit: on the 20th day of December, A. D. 1881, there was filed in the Clerk's office of the Circuit Court of the United States for the Northern district of Ohio, Eastern Division, the following petition viz:

PETITION.

CIRCUIT COURT OF THE UNITED STATES.
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS, *Plaintiff.*

vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY, OF MAINE. *Defendant.*

Civil Action for Money Only.

And now comes the plaintiff, Electa L. Waters, who is a citizen of the State of Ohio, and a resident of the Northern District and Eastern Division thereof, and complains of the defendant, The Union Mutual Life Insurance Company, which is a corporation duly organized under the laws of the State of Maine, and a citizen of the last named State, for that heretofore, on the 30th day of June, 1881, she was the wife of one Alfred J. Waters then in full life but since deceased. That on said 30th day of June, 1881, at Cleveland in said State of Ohio, in consideration of the application of the policy of insurance and of the payment by said Alfred J. Waters to defendant of the premium of one hundred and fifty-nine dollars and forty cents to be evidenced by the receipt of the Company, and of the payment of the like sum to be made at the office of the defendant on or before the 15th day of June in every year during the continuance of the policy the defendant by its President and Secretary duly authorized

thereto made its policy in writing upon the life of the said Alfred J. Waters for the benefit of plaintiff, in case she should survive him, of which the following is a copy.

"Union Mutual Life Insurance Company of Maine, Amount of Policy $4,000; Age at issue 46; Premium $159.40; Policy number, 7,364. In consideration of the application for this policy of insurance which is hereby referred to and made a part of this contract and of each of the statements made therein, which, whether written by his own hand or not every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made, and in further consideration of the payment of the sum of one hundred and fifty-nine dollars and forty cents at the home office of the Company at the date hereof, to be evidenced by the receipt of the Company and of the payment of the like sum to be made at the said office on or before the 15th day of June in every year during the continuance of this contract, does promise Alfred J. Waters of Cleveland in the State of Ohio, to pay to said Alfred J. Waters the sum of four thousand dollars (any indebtedness to the company on account of this contract to be first deducted therefrom) at the office of the Company in Augusta, Maine, on the 15th day of June in the year nineteen hundred and twenty, or if the said Alfred J. Waters shall die before that time to pay said sum within ninety days after notice, and the hereinafter required proofs of death shall have been furnished to the

Company at its said office, to Electa L. Waters, his wife, if she survive him, if not, then to his executors, administrators or assigns, upon the following conditions: *First*, If any statement made in the application for this policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the Company shall be without liability under it. *Second*, If any premium or installment of a premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the Company shall be released from liability except as hereinafter provided, and the only evidence of payment shall be the receipt of the Company signed by the President or Secretary. *Third*, If the said person upon whose death this policy matures shall die in consequence of a duel; or of the violation of law, or by disease, violence, or accident brought about by intoxication, or shall impair his health by narcotic or alcoholic stimulants, or shall have delirium tremens, or if without the written consent of the Company signed by the President or Secretary thereof, he shall pass or remain beyond the limits of residence or travel, or shall personally engage in any of the occupations or employments which are specified on the back of this policy, the Company shall be released from all liability on account of this contract. *Fourth*, It is hereby declared and agreed that the self destruction of the person whether voluntary or involuntary, and whether he be sane or insane at the time is not a risk assumed by the Company in this contract, but in every such case the Company will upon demand made, and the

surrender of this policy, accompanied with satisfactory proofs of such death within ninety days after its occurrence pay the net reserve upon it held by the Company at the beginning of the year in which death occurs, calculated by the combined experience table of mortality, with interest at the rate of four per cent. premium, first deducting therefrom any indebtedness which shall have accrued to the Company on account of this contract.

7 *Fifth*, The contract with the parties hereto is completely set forth in this policy and the application therefor taken together and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated; and it is further declared and agreed that in case the obligation of the Company under this contract be defeated by the failure of any of the considerations or by the violation of any of the covenants or conditions recited or referred to herein, all payments which shall have been made to the Company on account of this contract shall be forfeited to the Company. *Sixth*, The proofs of death by which this contract matures shall be furnished to the Company within one year after such death and shall contain full and true answers under oath to the questions in the Company's blanks for proofs of death, relating to the life, health and death of the person in question, and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) The statement of the physician or physicians, if more than one,

who attended the deceased during his last illness, or within a year previous; (3) The statement of a responsible householder acquainted with the deceased; (4) The statement of the Undertaker. If any of these statements be omitted, the necessity of the omission must be established and further proofs satisfactory to the Company must be furnished; nor shall any suit against the company under this contract be brought, or action commenced after one year from the time when the right of action accrues, and if any such suit or action be brought after that time, the lapse of time shall be conclusive evidence against the claim. *Seventh*, The provisions and requirements printed by the Comany upon the back of this policy are hereby referred to and accepted as part of this contract as fully as if they were receipted at length over the signatures hereto affixed.

In witness whereof, the said Union Mutual Life Insurance Company has caused this policy to be signed by its President and Secretary, at its office, in the city of Augusta, the thirtieth day of June, A. D. 1881.

JOHN E. DEWITT, *President.*

J. P. CARPENTER, *Secretary.*

And Plaintiff further says that on the 25th day of August, A. D. 1881, the said Alfred J. Waters died in the city of Cleveland aforesaid, and that up to the time of his death, all premiums accrued or due upon said policy had been and were duly paid, and that the said Plaintiff and the said Alfred J. Waters have each duly and fully performed all

of the conditions of said policy of insurance on her part and on the part of the said Alfred J. Waters, to be done and performed, and that the said Alfred J. Waters did in his lifetime observe and keep all those conditions and provisions, which are ——— express conditions and agreements therein. That the said Plaintiff, more than ninety days before the commencement of this action, to wit, on the 13th day of September, A. D. 1881, at the Home Office of said Defendant, in the City of Augusta, State of Maine, gave to said Defendant due notice, and proofs of death of the said A. J. Waters, required under said policy as aforesaid, and duly demanded payment of the aforesaid sum of Four Thousand Dollars, which said Defendant refused to pay, and no part of same has been paid, and the said Defendant is indebted to Plaintiff thereon in the sum of Four Thousand Dollars, with interest thereon, from said 13th day of September, 1881, for which she asks judgment.

WILLEY, SHERMAN & HOYT,

Plaintiff's Attorneys.

9 NORTHERN DISTRICT OF OHIO, } ss.

Electa L. Waters being sworn, says she is Plaintiff in the foregoing action, and that the statements contained in the above petition are true, as she believes.

ELECTA L. WATERS.

Subscribed and sworn to before me the 19th day of December, 1881.

CHARLES BALFOUR,
U. S. Com'r N. D. O.

U. S. CIRCUIT COURT.
NORTHERN DISTRICT OF OHIO.

ELECTA L. WATERS,
Plaintiff,

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,
Defendant.

Precipe.

To the Clerk:

Issue summons in the above cause, returnable according to law. Amount claimed, $4,000.00, with interest from September 13th, 1881.

WILLEY, SHERMAN & HOYT,
Plaintiff's Attorneys.

And afterwards, to wit: On the 20th day of December, A. D. 1881, the following summons was issued out of the Clerk's office of said Court, being in the words and figures following, to wit:

SUMMONS:

THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO. } ss.

The President of the United States of America, to the Marshal of the Northern District of Ohio, Greeting: You are hereby commanded to notify the Union Mutual Life Insurance Company of Maine, that it has been sued by Electa L. Waters in the Circuit Court of the United States, within and for the said District, and that unless it answers by the 21st day of January, A. D. 1882, the petition of the said Plaintiff against it filed in the Clerk's office of said Court, at Cleveland, in said District, such petition will be taken as true, and judgment will be rendered accordingly. You will make due return of this summons on the 2d day of January, A. D. 1882.

Witness, The Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of December, A. D. 1881, and in the 106th year of the Independence of the United States of America.

[SEAL.]

A. J. RICKS, *Clerk.*

By O. C. BEATTY, *Deputy Clerk.*

Returnable 2d Monday after issued. Answer by 3d Saturday after return day.

And afterwards, to wit: On the 23d day of December, A. D. 1881, the following return was made on said summons, viz:

NORTHERN DISTRICT OF OHIO. } ss.

On the 23d day of December, 1881, I made due service of this writ at Cleveland, Ohio, on the within named, The Union Mutual Life Insurance Company, of Maine, by delivering to John O. Winship, Managing Agent thereof, a true and duly certified copy of this writ.

W. F. GOODSPEED, *U. S. Marshal.*
By JOHN ODELL, *Deputy.*

(Endorsed.) Summons. Amount claimed, $4,000,00, with interest from September 13th, 1881.
Returnable January 2d, 1882.
Rule for Answer January 21st, 1882.
Returned and filed December 23d, 1881.

A. J. RICKS, *Clerk.*

11 *CONTINUANCE.*

And afterwards, to wit: On the 29th day of December, being a day of the October Term, A. D. 1881, of said Court, this cause was continued to the next term of said Court.

And afterwards, to wit: On the 4th day of March, A. D. 1882, the following Answer was filed in said cause, in said Court, viz:

ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS,
Plaintiff,
—*vs.*—
THE UNION MUTUAL LIFE INSURANCE COMPANY,
Defendant.

} Answer.

And now comes the said Defendant, The Union Mutual Life Insurance Company, and for its answer to the Plaintiff's petition filed herein, says: *First*, That, heretofore, to wit: On the 16th day of June, 1881, an instrument in writing, purporting to be a policy of insurance on the life of one Alfred J. Waters, was made by this Defendant in the City of Augusta, State of Maine, and which instrument in writing is the same as referred to in the petition herein; but this Defendant denies that the alleged copy of said instrument, as set out in the petition, is a correct or true copy thereof. That the said instrument contained among other things, terms and conditions, as follows: "In consideration of the application for this policy of insurance, which hereby referred to, and made a part of this con-

tract, and of each of the statements made therein, which, whether written by his own hand or
12 not, every person accepting or acquiring any interest in this contract, hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made. And in further consideration of the payment of the sum of One Hundred and Eifty-nine Dollars and Forty Cents, at the Home Office of the Company at the date hereof, to be evidenced by the receipt of the Company, and of the payment of a like sum to be made at the said office, on or before the 15th day of June in every year during the continuance of this contract, does promise Alfred J. Waters, of Cleveland, in the State of Ohio, to pay to said Alfred J. Waters, the sum of Four Thousand Dollars (any indebtedness to the Company on account of this contract to be first deducted therefrom) at the office of the Company at Augusta, Maine, on the 15th day of June, in the year Nineteen Hundred and Twenty; or if said Alfred J. Waters shall die before that time, to pay said sum within ninety days after notice and the hereinafter required proofs of death shall have been furnished to the Company at its said office, to Electa L. Waters, his wife, if she survive him, if not, then to his executors, administrators or assigns," and among which conditions are the following: "*Second*, If any premium, or installment of a premium on this policy, shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the Company shall be released from liability. *Fifth*, The contract between

Give name and residence of your usual medical adviser. To which is answered to the question marked A, "Twelve years ago." To the question marked B, 'Typhoid fever.' To the question marked C, 'Dr. R. P. Brown, Cleveland, O.;' and to the question marked D, 'Have none.' 15. Is there anything to your knowledge or belief in your physical condition, family, or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? To which is answered, 'No.'" And in said application, said Alfred J. Waters declared that he had read the said questions and written answers, and that the answers as written were correct and true, and he thereby for himself and for all others who may in any event have or claim any interest in the insurance thereby applied for, did request and authorize any physician or surgeon having any knowledge or information, acquired professionally or otherwise, touching the matters therein referred to, mentioned or involved, to disclose the same fully at any time, at the instance of said Company, thereby waiving any privilege connected therewith. And it is declared and agreed in said application as follows: "And it is hereby declared and agreed: That all the statements and answers to the printed questions, written upon forms A and B, which, together with this declaration and agreement, constitute an application to the Union Mutual Life Insurance Company, of Maine, for an insurance upon the life of Alfred J. Waters, are offered to the said Company as a consideration of the contract applied for; each of which statements and answers, whether written

by his own hand or not, every person accepting or acquiring any interest in the policy hereby applied for, adopts as his own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the Company in reply to its inquiries, and upon which, should the insurance applied for be granted, the Company's contract will be founded. And this application is submitted to said Company with the following express covenants and agreements: *First*, That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said Company, and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application. *Second*, That if the insurance applied for be granted by the Company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy, and that in particular no insurance shall be claimed to be thereby granted against death by self-destruction, nor shall any insurance thereby granted remain in force after health shall have been impaired by narcotic or alcoholic stimulants. And that the entire contract contained in said policy and this application taken together
16 shall be construed and interpreted as a whole, and in each of its parts and obligations, according to the charter of the said Company, and the laws of the State of Maine, the place of the contract being expressly agreed to be the Home Office of the said Company, in the City of Augusta, in the State of Maine.

That the said questions and answers herein above set out are contained in Form B. of said application. And this Defendant says that the answers to the third question as above set out are untrue in this, that the said Alfred J. Waters was not then in good health, and did not usually have good health, that the said Alfred J. Waters was then afflicted with disease of the liver and billious troubles and had been so afflicted fora long time prior thereto. That the said answer to the 9th question as above set out, is not full, complete nor true; that the said Alfred J. Waters has had a disease of the liver and billious troubles, which was an illness not mentioned in questions 5, 6, 7 or 8 of said application. That the said answers to the 12th question as set out above are not full, complete nor true in this, that during the three years prior to the time of making said application the said Alfred J. Waters had at various times consulted and had been treated by a physician for an illness, to wit: For disease of the liver and billious trouble, and further that in March, 1881, he had consulted a physician and had been treated by a physician for a cold. That during the three years prior to, and at the time of the making of said application, the said Alfred J. Waters had a usual medical adviser. That the said answer to the 15th question as above set out is untrue in this. That the said Alfred J, Waters had been advised by his physician, and knew that he had a disease of the liver and billious troubles, whereby defendant says that the consideration of said alleged contract has failed, and that it is without liability under it.

17 *Third,* And for a third defense therein, this defendant refers to each and all of the allegations contained in the first and second defenses and makes them a part hereof, as fully and completely as though written at length herein. And further says that the said answers given to said 3rd, 9th, 12th and 15th questions as set out in the said second defense were willfully false, and were fraudulently made, and that they are material, and induced the Company to issue the policy, and but for such answers the policy would not have been issued, and moreover that the agent or Company had no knowledge of the falsity or fraud of such answer. Wherefore the consideration of the said alleged contract has failed, and this Defendant is without liability under it

Fourth: And for a fourth defense this defendant says that it is true that it is a corporation organized under the laws and is a citizen of the State of Maine and it denies each and every other statement and allegation contained in said petition. Wherefore this defendant asks to be dismissed with its costs.

THE UNION MUTUAL LIFE INSURANCE COMPANY.
By E. K. WILCOX, *Its Atty.*

STATE OF OHIO, }
CUYAHOGA COUNTY. } ss.

E. K. Wilcox being duly sworn says that he is the attorney of the Union Mutual Life Insurance Company Corporation under and by virtue of the laws of the State of Maine. That the statements and

allegations contained in its foregoing answer are true as he verily belives.

E. K. WILCOX.

Sworn to before me and subscribed in my presence by said E. K. Wilcox this 4th
[SEAL.] day of March, A. D., 1882.

W. F. CARR, *Notary Public.*

18 And afterwards, to wit: on the 21st day of April A. D. 1882, the following reply was filed in said cause in said Court, viz:

REPLY.

UNITED STATES CIRCUIT COURT
NORTHERN DISTRICT OF OHIO.

ELECTA L. WATERS,

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

Reply.

And now comes the plaintiff, and for reply to the answer of the defendant filed herein says: That she denies the truth of each and every allegation in said answer contained not admitted by the averments in said petition or this reply.

Second: And further replying, this plaintiff denies that said premium was not paid, and avers that the defendant through its agent in consideration of the acceptance by said Alfred J. Waters of said policy after the same was executed, agreed with him that said premium should be paid on or before September 1, 1881, and that said policy was thereupon accepted by said Alfred J. Waters: That prior to said last named date said Alfred J. Waters paid said premium by his promisory note to said Company Defendant; which was accepted by Defendant and a receipt in full for said premium signed by the President and Secretary of Defendant was delivered

to said Alfred J. Waters and Plaintiff denies each and every other allegation in said answer contained not admitted by the averments of this reply or said petition.

Third; And further replying this Plaintiff making all the averments contained in its reply secondly above stated, a part hereof says that after said note had been delivered and accepted and said receipt had been given, after the death of said Alfred J. Waters and said note became due, said note was sent to plaintiff by defendant without explanation and afterwards to wit: On the 28th day of August, 1881, and prior to said September. 1881, this Plaintiff tendered to defendant the full amount of said premium in lawful money, which tender Defendant recognized as a complete tender of said premium but refused to accept the same, and this Plaintiff has ever since been and is now ready and willing to pay the same to Defendant. And Plaintiff denies each and every other allegation in said answer contained not admitted by the averments in this reply or said petition.

Wherefore Plaintiff asks judgment against Defendant as in her petition prayed for.

ELECTA L. WATERS,
By WILLEY, SHERMAN & HOYT,
Her Attorneys.

NORTHERN DISTRICT OF OHIO, } ss.

Electa L. Waters being duly sworn says she is plaintiff herein and that the allegations contained in the foregoing reply are true as she believes.

ELECTA L. WATERS.

Subscribed and sworn to before me this 20th
[SEAL.] day of April, A. D. 1882.

WM. K. KIDEL, *Notary Public.*

And afterwards, to-wit: on the 26th day of April A. D. 1882, the following motion was filed in said cause in said court, viz:

MOTION TO STRIKE OUT FROM REPLY.

CIRCUIT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO EASTERN DIVISION.

20

ELECTA L. WATERS

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

Motion No. 4102.

And now comes the Defendant and moves the Court to strike out from the Plaintiff's reply all after the word "Second" on or about the 7th line of the first page thereof, also to strike out from the Plaintiff's reply all after the word "Third," on or about the 27th line of said reply, upon the grounds that said matter is redundant and inconsistant with the averments of the Petition.

THE UNION MUTAL LIFE INSURANCE COMPANY
By E. K. WILCOX, *Its Att'y.*

BRIEF.

The Plaintiff can recover only on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can be done only by amendment of the petition. See Durbin vs. Fisk—16 O. S. 533—According to the petition, payment is a condition precedent and without an allegation of performance, or equivalent, in the petition a demurrer thereto would be sustained.

The petition in this case *pleads payment*, and, so far as this allegation is concerned the answer is a *Denial.* This perfects the issue upon that question. Hence in so far as the reply *could* be construed to plead payment it is redundant, and in so far as the reply pleads *Tender*, it is inconsistent with the petition. The Plaintiff must elect to stand upon one ground or the other and must declare that election in his *Petition.* The defendant does not object to the *first part* of Plaintiff's reply, which contains simply a denial. But says that in so far as the *Second* and *Third* part contain a denial it is
21 redundant and in so far as they contain averments of payment or Tender they are repugnant to and inconsistent with the Petition.

E. K. Wilcox, *Atty. for Deft.*

And afterwards, to wit: on Tuesday the 19th day of September, A. D., 1882, being a day of the April Term A. D., 1882, of said Court, the following proceedings were had in said cause in said Court, viz:

MOTION DISALLOWED.

ELECTA L. WATERS,

—*vs*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

No. 4102.

This day come the parties, and come on for hearing the Defendant's motion to strike from the Plaintiff's Reply all after the word "Second," on or about the seventh line of the first page thereof. Also, to strike out all after the word "Third," on or about the twenty-seventh line of said Reply, and the same was argued by Counsel, and thereupon, upon consideration it is ordered that said motion be disallowed.

TRIAL OF CASE.

And afterwards, to wit: on the 7th day of November A. D., 1882, and on each of the days following as named hereafter, and each of them being days of the October Term, A. D. 1832, of said Court, proceedings were had in this cause. Honorable Martin Welker, District Judge presiding, as hereinafter set forth under the dates respectively, viz:

Tuesday, November 7th, 1882.

This day come the parties by their respective attorneys, and a jury being called come to wit: 22 Benjamin Sears, C. M. Aten, Darius Walcot, John Murray, Robert Carran, Joseph Biggs, A. A. Pond, Thomas J. Monnett, Enos Moreland, Caleb S. Butts, John E. Coe and Peter Numsen, who being accepted were duly empannelled, sworn and affirmed to welt and truly try the issues joined between the parties, testimony was heard on behalf of the Plaintiff, but not closed, when the further trial of this case was postponed until to-morrow.

Wednesday, November 8th.

This day again come the parties by their attorneys, and come also the jury heretofore empanelled, sworn and affirmed herein, and the trial of this

cause proceeded, the Plaintiff's testimony was closed, and testimony was offered on behalf of the Defendant, but was not closed when the hour for adjournment arrived, and further trial of this case was continued until to-morrow.

Thursday, November 9th.

This day again come the parties by their attorneys, and come also the jury heretore empanelled, sworn and affirmed herein,and the trial of this cause proceeded, the testimony was closed and the arguments of counsel were begun but not concluded, when the further trial of this cause was continued until to-morrow.

Friday, November 10th.

This day again come the parties, and come also the jury heretofore empanelled, sworn and affirmed herein, and the trial of this cause proceeded,
23 the arguments of counsel were continued but not concluded, when the further trial of this case was postponed until to-morrow.

Saturday, November 11th.

This day again come the parties by their attorneys, and come also the jury heretofore empanelled, sworn and affirmed herein, and the trial of this case proceeded, the arguments of counsel were contined but not concluded, and the further trial of this case was postponed until Monday morning next.

VERDICT.

Monday, November 13th.

This day again come the parties by their attorneys, and come also the jury heretofore empanelled, sworn and affirmed herein, and the trial of this case proceeded, the arguments of counsel were closed and the jury having received their instructions from the Court, retired to deliberate in charge of the Marshall, and after a time come again into Court and for verdict say: "We the Jury in this case being duly empanelled and sworn do find for the Plaintiff and we do assess her damages to the sum of four thousand and twenty-eight and 16-100 dollars.

THOMAS J. MONNETT, *Foreman.*

And afterwards, to wit: on the 14th day of November, A. D. 1882, the following motion was filed in said cause in said Court, viz:

MOTION FOR NEW TRIAL.

IN THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

24

ELECTA L. WATERS,
Plaintiff,
—*vs.*—
UNION MUTUAL LIFE INSURANCE COMPANY,
Defendant.
} Motion.

And now comes the Defendant, Union Mutual Life Insurance Company, and moves the Court to set aside the verdict returned by the Jury in the above entitled case, and grant it a new trial upon the grounds and for the reasons following, to wit:

1st. That the verdict of the Jury is not sustained by sufficient evidence.

2d. That the verdict of the Jury is against the weight of the evidence.

3d. That the verdict of the Jury is contrary to law.

4th. That the Court erred in admitting evidence offered by the Plaintiff, and objected to by the Defendant and excepted to at the time.

5th That the Court erred in rejecting evidence offered by the Defendant, and to which the Defendant excepted at the time.

6th. That the Court erred in its charge to the Jury, to which the Defendant excepted at the time.

7th. For error of law occuring at the trial, and by the Defendant excepted to at the time.

E. K. WILCOX AND NELSON SAYLER,
Attorneys for Defendant.

CONTINUANCE.

And afterwards, to wit: On the 28th day of February, being a day of the February Term, A. D. 1883, of said Court, this cause was continued to the next term of said Court.

And afterwards, to wit: On the 17th day of April, it being a day of the April Term, A. D. 1883, of said Court, Honorable John Baxter, Circuit Judge, and Honorable Martin Welker, District Judge, presiding, the following proceedings were had, viz:

MOTION ALLOWED.

ELECTA L. WATERS

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

This day come the parties by their Counsel, and come on to be heard the Defendant's motion to set aside the verdict heretofore rendered in this case, and for a new trial, and the same was argued by Counsel, and thereupon upon consideration it is ordered that said motion be allowed, and that the verdict heretofore rendered in this case at the October Term, A. D. 1882, of this Court, be set aside, and a new trial be allowed.

And afterwards, to wit: On the 24th day of April, A. D. 1883, the following motion was filed in said cause in said Court, viz:

MOTION TO CONSOLIDATE.

IN THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE. } Motion No. 4102.

And now comes the Defendant and moves the Court to consolidate this action with cause No. 4103, now pending in this Court between the same parties, Plaintiff and Defendant.

THE UNION MUTUAL LIFE INSURANCE COMPANY.
By E. K. WILCOX, *Its Attorney.*

26 We hereby acknowledge notice of the filing and pendency of the foregoing motion.

WILLEY, SHERMAN AND HOYT,
April 24th, 1883. *Attorneys for Plaintiff.*

And afterwards, to wit: On Friday the 4th day of May, being a day of the April Term, A. D. 1883, of said Court, the Honorable Martin Welker, District Judge, presiding, the following proceedings were had in said cause, viz:

MOTION ALLOWED.

ELECTA L. WATERS
—*vs.*—
THE UNION MUTUAL LIFE INSURANCE COMPANY. } No. 4102.

This day come the parties by their Counsel, and this cause come on to be heard upon the motions of the Defendant to consolidate this case with case No. 4103 between the same parties, and was argued by Counsel, and thereupon it was ordered that this case be consolidated with said case No. 4103, and the two cases be proceeded with hereafter as one case, and be tried as one case.

NO. 4103.

Be it remembered that heretofore, to wit; On the 20th day of December, A. D. 1881, the following Petition was filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio, which Petition is in the words and figures following, to wit:

PETITION.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

27

ELECTA L. WATERS,
Plaintiff,

THE UNION MUTAL LIFE INSURANCE COMPANY OF MAINE,
Defendant.

Petition for Money Only.

And now comes the Plaintiff, Electa L. Waters, who is a citizen of the State of Ohio, and a resident of the Northern District and Eastern Division of Ohio, and complains of the Defendant, The Union Mutual Life Insurance Company, a corporation duly organized under the laws, and a citizen of the State of Maine, for that heretofore, to wit: On the 16th day of June, 1881, she was the wife of one Alfred J. Waters, then in full life, but since deceased; that on said last named day, at Cleveland, in said State of Ohio, in consideration of the application for the policy of insurance and the payment by the said Alfred J. Waters to the De-

fendant of the premium of One Hundred and ninety-nine 25-100 Dollars, to be evidenced by the receipt of the Defendant, and of the payment of the like sum to be made at the office of the Defendant on or before the 15th day of June in every year during the continuance of the policy, the Defendant by its President and Secretary duly authorized thereto, made its policy in writing upon the life of the said Alfred J. Waters for the benefit of the Plaintiff, in case she should survive him, of which the following is a copy:

"Union Mutual Life Insurance Company of Maine. Amount of policy, $5,000. Age at issue, 46. Premium, $199.25. Policy number, 73,549. In consideration of the application for this policy of insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts
28 as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the payment of the sum of one hundred and ninety-nine dollars and twenty-five cents at the home office of the Company at the date hereof, to be evidenced by the receipt of the Company and of the payment of a like sum to be made at the said office on or before the 15th day of June in every year during the continuance of this contract, does promise Alfred J. Waters of Cleveland in the State of Ohio, to pay to

said Alfred J. Waters the sum of five thousand dollars (any indebtedness to the company on account of this contract to be first deducted therefrom) at the office of the Company in Augusta, Maine, on the 15th day of June in the year nineteen hundred and twenty, or if the said Alfred J. Waters shall die before that time to pay said sum within ninety days after notice, and the hereinafter required proofs of death shall have been furnished to said Company at its said office, to Electa L. Waters, his wife, if she survive him, if not, then to his executors, administrators or assigns, upon the following conditions:

First: If any statement made in the application for this policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the company shall be without liability under it.

Second. If any premium, or installment of a premium on this policy shall not be paid when due the consideration of this contract shall be deemed to have failed and the Company shall be released from liability except as hereinafter provided, and the only evidence of payment shall be the receipt of the Company signed by the President or Secretary.

Third: If the said person upon whose death this policy matures shall die in consequence of a duel or of the violation of law, or by disease, vio-
29 lence or accident brought about by intoxication, or shall impair his health by narcotics or alcoholic stimulants; or shall have delirium tre-

mens, or if, without the written consent of the Company signed by the President or Secretary thereof, he shall pass or remain beyond the limits of residence and travel, or shall personally engage in any of the occupations or employments which are specified on the back of this policy, the company shall be released from all liability on account of this contract.

Fourth, It is hereby declared and agreed that the self destruction of the person whether voluntary or involuntary and whether he be sane or insane at the time, is not a risk assumed by the Company in this contract, but in every such case the Company will upon demand made, and the surrender of this policy accompanied with satisfactory proofs of such death within ninety days after its occurrence pay the net reserve upon it, held by the Company at the beginning of the year in which death occurs calculated by the combined experience table of mortality with interest at the rate of four per cent. per annum, first deducting therefrom any indebtedness which shall have accrued to the Company on account of this contract.

Fifth: The contract between the parties hereto is completely set forth in this policy, and the application therefor taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated, and it is further declared and agreed that in case the obligation of the Company under this contract be

defeated by the failure of any of the considerations or by the violation of any of the covenants or conditions recited or referred to herein, all payments which shall have been made to the Company on account of this contract shall be forfeited to the company.

Sixth: The proofs of the death by which this contract matures shall be furnished to the Company within one year after such death, and shall contain full and true answers under oath to the questions in the Company's blanks for proofs of death, relating to the life, health and death of the person in question, and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) The statement of the physician or physicians, if more than one, who attended the deceased during his last illness, or within a year previous; (3) The statement of a responsible householder acquainted with the deceased; (4) The statement of the Undertaker. If any of these statements be omitted, the necessity of the omission must be established and further proofs satisfactory to the Company must be furnished; nor shall any suit against the company under this contract be brought, or action commenced after one year from the time when the right of action accrues, and if any such suit or action be brought after that time, the lapse of time shall be conclusive evidence against the claim.

Seventh, The provisions and requirements printed by the Company upon the back of this policy are hereby referred to and accepted as part of this con-

tract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the said Union Mutual Life Insurance Company has caused this policy to be signed by its President and Secretary, at its office, in the city of Augusta, the sixteenth day of June, A. D. 1881.

JOHN E. DEWITT, *President.*
J. P. CARPENTER, *Secretary.*

And Plaintiff further says that on the 25th day of August, A. D. 1881, the said Alfred J. Waters died in the city of Cleveland aforesaid, and that up to the time of his death, all premiums
31 accrued or due upon said policy had been and were duly paid, and that the said Plaintiff and the said Alfred J. Waters have each duly and fully performed all of the conditions of said policy of insurance on her part and on the part of the said Alfred J. Waters, to be done and performed, and that the said Alfred J. Waters did in his life-time observe and keep all of those conditions and provisions, which are express conditions and agreements therein. That the said Plaintiff, more than ninety days before the commencement of this action, to wit, on the 13th day of September, A. D. 1881. at the Home Office of said Defendant, in the City of Augusta, State of Maine, gave to said Defendant due notice, and proofs of death of the said Alfred J. Waters, required under said policy as aforesaid, and duly demanded payment of the aforesaid sum of Five Thousand Dollars, which said Defendant refused to pay, and no part of same has been paid,

and the said Defendant is indebted thereon to the Plaintiff in the sum of Five Thousand Dollars, with interest thereon, from said 13th day of September, 1881, for which she asks judgment.

WILLEY, SHERMAN & HOYT,

Plaintiff's Attorneys.

9 NORTHERN DISTRICT OF OHIO, } ss.

Electa L. Waters being sworn, says she is Plaintiff herein and that the allegations contained in the foregoing petition are true, as she believes.

ELECTA L. WATERS.

Subscribed and sworn to before me this 19th day of December, 1881.

CHARLES BALFOUR,
U. S. Com'r N. D. O.

U. S. CIRCUIT COURT,
NORTHERN DISTRICT OF OHIO.

ELECTA L. WATERS,
Plaintiff,
—*vs.*—
THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,
Defendant.
Precipe.

32 *PRECIPE.*

To the Clerk:

Issue summons in the above cause, returnable according to law. Amount claimed, $5,000, with interest from September 13th 1881.

WILLEY, SHERMAN & HOYT,
Plaintiff's Attorneys.

And afterwards, to wit: On the 20th day of December, A. D. 1881, the following summons was issued from the Clerk's office of said Court, in the above entitled cause, viz:

SUMMONS:

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO. ss.

The President of the United States of America, to the Marshal of the Northern District of Ohio, Greeting: You are hereby commanded to notify the Union Mutual

Life Insurance Company of Maine, that it has been sued by Electa L. Waters in the Circuit Court of the United States, within and for the said District, and that unless it answers by the 21st day of January, A. D. 1882, the petition of the said Plaintiff against it filed in the Clerk's office of said Court, at Cleveland, in said District, such petition will be taken as true, and judgment will be rendered accordingly. You will make due return of this summons on the 2d day of January, A. D. 1882.

Witness, The Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of December, A. D. 1881, and in
[SEAL.] the 106th year of the Independence of the United States of America.

A. J. RICKS, *Clerk.*
By O. C. BEATTY, *Deputy Clerk.*

Returnable 2d Monday after issued. Answer by 3d Saturday after return day.

And afterwards, to wit: On the 23d day of De-
33 cember, A. D. 1881, said summons was filed with the following return endorsed thereon, viz:

NORTHERN DISTRICT OF OHIO. } ss.

On the 23d day of December, 1881, I made due service of this writ at Cleveland, Ohio, on the within named, The Union Mutual Life Insurance Company, of Maine, by

delivering to John O. Winship, Managing Agent thereof, a true and duly certified copy of this writ.

W. F. GOODSPEED, *U. S. Marshal.*
By JOHN ODELL, *Deputy.*

(Endorsed.) Summons. Amount claimed, $5,000,00, with interest from September 13th, 1881.
Returnable January 2d, 1882.
Rule for Answer January 21st, 1882.
Returned and filed December 23d, 1881.

A. J. RICKS, *Clerk.*

CONTINUANCE.

And afterwards, to wit: On the 29th day of December, being a day of the October Term, A. D. 1881, of said Court, this cause was continued to the next term of said Court.

And afterwards, to wit: On the 4th day of March, A. D. 1882, the following Answer was filed in said cause, in said Court, viz:

ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS,
Plaintiff,
—*vs.*—
THE UNION MUTUAL LIFE INSURANCE COMPANY,
Defendant.
} Answer.

And now comes the said Defendant, The Union Mutual Life Insurance Company, and for
34 its answer to the Plaintiff's petition filed herein, says:

First, That, heretofore, to wit: On the 16th day of June, 1881, an instrument in writing, purporting to be a policy of insurance on the life of one Alfred J. Waters, was made by this Defendant in the City of Augusta, State of Maine, and which instrument in writing is the same as referred to in the petition herein; but this Defendant denies that the alleged copy of said instrument, as set out in the petition, is a correct or true copy thereof. That the said instrument contained among other things, terms and conditions, as follows: "In consideration of the application for this policy of insurance, which is hereby referred to, and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any

interest in this contract, hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made. And in further consideration of the payment of the sum of One Hundred and Ninty-nine Dollars and Twenty-five Cents, at the Home Office of the Company at the date hereof, to be evidenced by the receipt of the Company, and of the payment of a like sum to be made at the said office, on or before the 15th day of June in every year during the continuance of this contract, does promise Alfred J. Waters, of Cleveland, in the State of Ohio, to pay to said Alfred J. Waters, the sum of Five Thousand Dollars (any indebtedness to the Company on account of this contract to be first deducted therefrom) at the office of the Company in Augusta, Maine, on the 15th day of June, in the year Nineteen Hundred and Twenty; or if said Alfred J. Waters shall die before that time, to pay said sum within ninety days after notice and the hereinafter required proofs
35 of death shall have been furnished to the Company at its said office, to Electa L. Waters, his wife, if she survive him, if not, then to his executors, administrators or assigns,"

And among which conditions are the following: "*Second*, If any premium, or installment of a premium on this policy, shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the Company shall be released from liability. *Fifth*, The contract between the parties hereto is completely set forth in this policy, and the application therefor taken together,

and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated. *Seventh*, the provisions and requirements printed by the Company upon the back of this policy are hereby referred to and accepted as part of this contract as fully as if they were recited at length over the signatures hereto affixed."

That among the provisions and requirements so printed on the back of said policy is the following: "All premiums are due at the office of the Company, in the City of Augusta, at the date named in the policy."

That in the said application referred to in said policy as above set out, and which is hereby made a part of this contract, it is among other things covenanted and agreed that the said application will constitute no contract of insurance until a policy shall first have been issued and delivered by said Company, and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application. And that the entire contract contained in the said policy and this application taken together, shall be construed and interpreted as a whole." But this Defendant says
36 that the said policy was not issued or delivered by the said Company, and that the first premium thereon was not actually paid during the continuance of the life proposed for insurance. And it denies that they issued said policy or delivered

the same to the said Alfred J. Waters or Electa L. Waters, or to any one for them, or either of them, or that the first premium, or any premium thereon, was paid by said Alfred J. Waters, or Electa L. Waters, or by any one for them, or either of them.

Wherefore this Defendant says that the said application for insurance, and the said alleged policy, never became a contract of insurance. And Defendant says that if the said Plaintiff, or said Alfred J. Waters ever obtained the possession of said policy, or of the receipt for the first premium, such possession was obtained through fraud, and that neither of said parties is, or was ever entitled to the possession of the same. *Second.* And for a second defense, the Defendant refers to the allegations contained in the first defense herein, and makes them a part of this defense as fully as though written herein at length, and further says: That among other things contained in the said application are the following questions and answers, viz: "3A. Are you now in good health? B. Do you usually have good health? To which is answered to the question marked A, 'Yes,' and to the question marked B, 'Yes.' 9. Have you ever had any illness not mentioned in questions Nos. 5, 6, 7 and 8? If so, state fully all the particulars. To which is answered, 'typhoid fever, twelve years ago, and cold a few weeks ago.' 12 A. When did you last consult a physician for any illness? B. What was that illness? C. Who was that physician? Give name and residence. D. Give name and residence of your usual medical adviser. To which is answered to the question

marked A, "Twelve years ago." To the question marked B, 'Typhoid fever.' To the question marked C, 'Dr. R. P. Brown, Cleveland, O.;' and to the
37 question marked D, 'Have none.' 15. Is there anything to your knowledge or belief in your physical condition, family, or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? To which is answered, 'No.'" And in said application, said Alfred J. Waters declared that he had read the said questions and written answers, and that the answers as written were correct and true, and he thereby for himself and for all others who may in any event have or claim any interest in the insurance thereby applied for, did request and authorize any physician or surgeon having any knowledge or information, acquired professionally or otherwise, touching the matters therein referred to, mentioned or involved, to disclose the same fully at any time, at the instance of said Company, thereby waiving any privilege connected therewith. And it is declared and agreed in said application as follows: "And it is hereby declared and agreed: That all the statements and answers to the printed questions, written upon forms A and B, which, together with this declaration and agreement, constitute an application to the Union Mutual Life Insurance Company, of Maine, for an insurance of Five Thousand Dollars upon the life of Alfred J. Waters, are offered to the said Company as a consideration of the contract applied for; each of which statements and answers, whether written by his own hand or not, every person accepting or

acquiring any interest in the policy hereby applied for, adopts as his own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the Company in reply to its inquiries, and upon which, should the insurance applied for be granted, the Company's contract will be founded. And this application is submitted to said Company with the following express covenants and agreements: *First*, That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said
38 Company, and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application. *Second*, That if the insurance applied for be granted by the Company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy, and that in particular no insurance shall be claimed to be thereby granted against death by self-destruction, nor shall any insurance thereby granted remain in force after health shall have been impaired by narcotic or alcoholic stimulants. And that the entire contract contained in said policy and this application taken together shall be construed and interpreted as a whole, and in each of its parts and obligations, according to the charter of the said Company, and the laws of the State of Maine, the place of the contract being expressly agreed to be the Home Office of the said Company, in the City of Augusta, in the said State of Maine."

And the said questions and answers herein above set out are contained in Form B. of said application.

And this Defendant says that the answers given to the third question as above set out are untrue in this, that the said Alfred J. Waters was not then in good health, and did not usually have good health, that the said Alfred J. Waters was then afflicted with a disease of the liver and billious troubles and had been so afflicted for a long time prior thereto.

That the said answer to the 9th question as above set out, is not full, complete nor true; that the said Alfred J. Waters has had a disease of the liver and billious troubles, which was an illness not mentioned in questions 5, 6, 7 or 8 of said application. That the said answers to the 12th question as set out above are not full, complete nor true in this, that during the three years prior to the time of making said application the said
39 Alfred J. Waters had at various times consulted and had been treated by a physician for an illness, to wit: For disease of the liver and billious trouble, and further that in March, 1881, he had consulted a physician and had been treated by a physician for a cold. That during the three years prior to, and at the time of the making of said application, the said Alfred J. Waters had a usual medical adviser. That the said answer to the 15th question as above set out is untrue in this. That the said Alfred J. Waters had been advised by his physician, and knew that he had a disease of the liver and billious troubles, whereby defendant says that the consideration of said alleged contract has failed, and that it is without liability under it.

Third, And for a third defense herein, this Defendant refers to each and all of the allegations contained in the first and second defenses and makes them a part hereof, as fully and completely as though written out at length herein. And further says that the said answers given to said 3rd, 9th, 12th and 15th questions as set out in the said second defense were willfully false, and were fraudulently made, and that they are material, and induced the Company to issue the policy, and but for such answers the policy would not have been issued, and moreover that the agent or the Company had no knowledge of the falsity or fraud of such answers. Wherefore the consideration of the said alleged contract has failed, and this Defendant is without liability under it.

Fourth: And for a fourth defense this defendant says that it is true that it is a corporation organized under the laws and is a citizen of the State of Maine and it denies each and every other statement and allegation contained in said petition.

Wherefore this defendant asks to be dismissed with its costs.

40

THE UNION MUTUAL LIFE INSURANCE COMPANY.
By E. K. WILCOX, *Its Atty.*

STATE OF OHIO, }
CUYAHOGA COUNTY. } ss.

E. K. Wilcox being duly sworn says that he is the attorney of the Union Mutual Life Insurance Com-

pany a Corporation under and by virtue of the laws of the State of Maine. That the statements and allegations contained in its foregoing answer are true as he verily believes.

E K. WILCOX.

Sworn to before me and subscribed in my presence by said E. K. Wilcox this 4th day of March, A. D., 1882.

[SEAL.]

W. F. CARR, *Notary Public.*

And afterwards, to wit: on the 21st day of April A. D. 1882, the following reply was filed in said cause in said Court, viz:

REPLY.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS,

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

Reply.

And now comes the plaintiff, and for reply to the answer of the defendant filed herein says: That she denies the truth of each and every allegation in said answer contained not admitted by the averments of said petition or of this reply.

Second: And further replying, this plaintiff denies that said premium was not paid, and avers that the defendant through its agent in consider-
41 ation of the acceptance by said Alfred J. Waters of said policy after the same was executed, agreed with him that said premium should be paid on or before September 1, 1881, and that said policy was thereupon accepted by said A. J. Waters: That prior to said last named date said Alfred J. Waters paid said premium by his promisory note to said Company Defendant; which was accepted by Defendant and a receipt in full for said premium signed by the President and Secretary of Defendant was delivered to said Alfred J. Waters; and Plaintiff denies each and every other allegation in said answer contained not admitted by the averments of said petition or of this reply.

Third; And further replying this Plaintiff making all the averments contained in its reply secondly above stated, a part hereof says that after said note had been delivered and accepted and the said receipt had been given, and after the death of the said Alfred J. Waters and before said note became due, said note was sent to plaintiff by defendant without explanation and afterwards On the 28th day of August, 1881, and prior to said September 1st, 1881, this Plaintiff tendered to defendant the full amount of said premium in lawful money, which tender Defendant recognized as a complete tender of said premium but refused to accept the same, and this Plaintiff has ever since been and is now ready and willing to

pay the same to Defendant. And Plaintiff denies each and every other allegation in said answer contained not admitted by the averments in this reply or in its petition.

Wherefore Plaintiff asks judgment against Defendant as in her petition prayed for.

ELECTA L. WATERS,
By WILLEY, SHERMAN & HOYT,
Her Attorneys.

42

NORTHERN DISTRICT OF OHIO, } ss.

Electa L. Waters being duly sworn says she is plaintiff herein and that the allegations contained in the foregoing reply are true as she believes.

ELECTA L. WATERS.

Subscribed and sworn to before me this 20th
[SEAL.] day of April, A. D. 1882.

WM. K. KIDD, *Notary Public.*

And afterwards, to-wit: on the 26th day of April A. D. 1882, the following motion was filed in said cause in said court, viz:

MOTION TO STRIKE OUT.

CIRCUIT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF OHIO EASTERN DIVISION.

ELECTA L. WATERS

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

Motion No. 4103.

And now comes the Defendant and moves the Court to strike out from the Plaintiff's reply all after the word "Second" on or about the 7th line of the first page thereof, also to strike out from the Plaintiff's reply all after the word "Third," on or about the 27th line of said reply, upon the grounds that said matter is redundant and inconsistent with the averments of the Petition.

THE UNION MUTAL LIFE INSURANCE COMPANY
By E. K. WILCOX, *Its Att'y.*

BRIEF.

See Brief in No. 4102.

CONTINUANCE.

And afterwards, to wit: on the 29th day of July being a day of the April Term A. D., 1882, of said

Court this cause was continued to the next term of said Court.

43 And Afterwards to wit: on Tuesday, the 19th day of September, being a day of the April Term, A. D., 1882, of said Court, the following proceedings were had in said cause, in said Court, viz:

MOTION DISALLOWED.

ELECTA L. WATERS,
—*vs*—
THE UNION MUTUAL LIFE INSURANCE COMPANY.
No. 4103.

This day came the parties, and came on for hearing the Defendant's motion to strike from the Plaintiff's Reply all after the word "Second," on or about the seventh line on the first page thereof. Also, to strike out all after the word "Third," on or about the twenty-seventh line of said Reply, and the same was argued by Counsel, and thereupon, upon consideration it is ordered that said motion be disallowed.

CONTINUANCE.

And afterwards, to wit: on the 20th day of December, being a day of the October Term A. D., 1882, of said Court, this cause was continued to the next term of said Court.

CONTINUANCE.

And afterwards, to wit: On the 28th day of February, being a day of the February Term, A. D. 1883, of said Court, this cause was continued to the next term of said Court.

And afterwards, to wit: On the 6th day of May, A. D. 1884, and on each of the days following as named hereafter, and each of them being days of the April Term, A. D. 1884, of said Court, The Honorable Martin Welker, District Judge presiding, proceedings were had in this case as hereinafter set forth under the dates respectively, viz:

44 *TRIAL OF CASE.*

Tuesday, May 6th.

ELECTA L. WATERS,

—*vs.*—

THE UNION MUTUAL LIFE INSURANCE COMPANY.

Consolidated Case No. 4103.

This day come the parties by their respective attorneys, and a jury being called come, to wit: Tyler Wing, Madison Trail, S. C. Wilson, William Hurst, G. W. Osborn, Joseph W. Cook, C. L. Taylor, Lorenzo Clark, Henry Janvertz, John Beverton, Frank Throckwell and W. G. Eberman, who, being accepted were duly empaneled, sworn and affirmed

herein to well and truly try the issues joined between the parties at bar. The Plaintiff's testimony was begun, but not concluded, when the further trial of this case was postponed until to-morrow.

Wednesday, May 7th.

This day again come the parties by their counsel, and come the jury as heretofore empaneled, and sworn and affirmed herein, and the trial of this case proceeded, the Plaintiff's testimony was closed, and the Defendant's was begun, but not concluded, when the further trial of this case was postponed until to-morrow.

Thursday, May 8th.

This day again come the parties, and come also the jury as heretofore empaneled, and sworn and affirmed herein, and the trial of this case proceeded, the testimony was closed and the arguments of counsel begun, but not concluded, when the further trial of this case was postponed until to-morrow.

Friday, May 9th.

This day again come the parties by their counsel, and come also the jury as heretofore empaneled, sworn and affirmed herein, and the trial of this case proceeded, the arguments of counsel were concluded, and the jury having first received their instruc-

tions from the Court, retired to deliberate in charge of the Marshal, but having agreed upon their verdict when the hour for adjournment arrived, the further trial of this case was postponed until to-morrow.

Saturday, May 10th.

This day again come the parties by their counsel, and come also the jury as heretofore empaneled, sworn and affirmed herein, and said jury having agreed upon their verdict, say: "We the jury in this case being duly empaneled and sworn do find for the Plaintiff, and we do assess her damages to the sum of Nine Thousand Nine Hundred Thirty-seven and 55-100 dollars.

MADISON TRAIL, *Foreman.*

And afterwards, to wit: on the 12th day of May, A. D. 1884 the following motion was filed in said cause in said Court, viz:

MOTION FOR NEW TRIAL.

IN THE UNITED STATES, CIRCUIT COURT OF THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

46

ELECTA L. WATERS, *Plaintiff,*

—*vs.*—

UNION MUTUAL LIFE INSURANCE COMPANY, *Defendant.*

Motion For New Trial.

And now comes the Defendant, Union Mutual Life Insurance Company, and moves the Court to set aside the verdict heretofore rendered in this case, and grant to said defendant a new trial upon the grounds and for the reasons following:

That the verdict is not sustained by sufficient evidence.

That the verdict is contrary to the weight of the evidence.

That the verdict is contrary to law.

For error of law occurring at the trial, and excepted to by the Defendant at the time.

For error of law in the charge of the Court to

the jury, and excepted to by the Defendant at the time.

THE UNION MUTUAL LIFE INSURANCE COMPANY,
By E. K. WILCOX AND
JOHN O. WINSHIP, *Its Attys.*

And afterwards, to wit: on Tuesday the 27th day of May, being a day of the April Term A. D., 1884, of said Court. The Honorable Martin Welker District Judge presiding, the following proceedings were had in said cause, viz:

MOTION TAKEN UNDER ADVISEMENT.

ELECTA L. WATERS
—*vs.*—
THE UNION MUTUAL LIFE INSURANCE COMPANY.
No. 4103.
Consolidated Case.

This day come the parties by their Counsel, and and come on to be heard Defendants motion to set aside the verdict, and for a new trial, and
47 the same was argued by counsel, and taken under advisement by the Court.

And afterwards, to wit: On the 20th day of February, A. D. 1885, the following motion was filed in said cause in said Court, viz:

MOTION FOR NUNC PRO TUNC ORDER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS,
Plaintiff,
THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,
Defendant.
} Motion.

Now comes the defendant and moves the Court to make an order *nunc pro tunc* on the clerk to file as of the February Term A. D., 1885, the Bill of Exceptions heretofore, at the February Term, A. D. 1885, signed and allowed by the Court in this case.

JOHN O. WINSHIP,
Att'y for Defendant.

JUDGMENT, ETC.

ELECTA L. WATERS —*vs.*— THE UNION MUTUAL LIFE INSURANCE COMPANY.	No. 4103.

And now on this 23d day of February, A. D. 1885, being a day of the February Term, A. D. 1885, of said Court, the Defendant's motion to set aside the verdict heretofore rendered herein at the April Term, A. D. 1884 of said Court, and for a new trial come on to be heard, and thereupon, upon consideration, it is ordered that said motion be overruled, to which Defendant excepts. And thereupon the Defendant's motion for an order *nunc pro tunc* heretofore filed at said February Term, 1885, is
48 heard and granted, and the Clerk is ordered to file the Bill of Exceptions therein referred to, and make the same a part of the record of this case, now for then, as of the said April Term, A. D. 1884 to which order last named, the Plaintiff then and there excepts.

Thereupon it is considered by the Court that the Plaintiff recover of the Defendant the sum of Ten thousand Nine Hundred Ninety-three Dollars and Sixteen Cents, ($10,993.16) being the amount of said verdict with interest included to the first day of

this term, together with interest on said sum from February 3d, 1885, and costs of this suit to be taxed at $——— and that defendant pay its own costs.

And afterwards, to wit: on the 23d day of February, A. D., 1885, the following Bill of Exceptions was filed as of the April Term, A. D. 1884 as per order of Court, being in the words and figures following, to wit:

49

BILL OF EXCEPTIONS.

THE UNITED STATES OF AMERICA, FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

ELECTA L. WATERS,
Plaintiff,
—*vs.*—
THE UNION MUTUAL LIFE INSURANCE COMPANY,
Defendant.

Be it remembered, That this cause came on to be heard before the Honorable Martin Welker,

District Judge of said District, sitting alone at the April Term, A. D. 1884, of the said Court, begun and held at the Circuit Court Room of the said Court, at the City of Cleveland, in the Eastern Division of the said Northern District of Ohio, on the Sixth day of May, A. D. 1884, upon the pleadings, exhibits and proofs. That thereupon, a jury being first duly empaneled and sworn, the said plaintiffs to maintain the issues on their part to be maintained, introduced the following testimony, namely:

DEPOSITION OF ELECTA L. WATERS.

Electa L. Waters, the Plaintiff, being duly sworn, testified as follows:

Q. (By Mr. Hoyt.) State your name and age.

A. Mrs. A. J. Waters; age, forty-five; residence 1719 Euclid Avenue.

Q. You are the widow of Alfred J. Waters, are you not?

A. Yes, sir.

Q. State when it was, if you know, that any efforts were made on the part of anybody representing this Insurance Company, looking toward the taking out of insurance by your husband, in this Company.

A. I am not positive about the date, but I think it was in the month of February.

Q. What was the first said by anybody representing this Insurance Company to your husband

in your hearing in regard to the taking out of a policy of insurance in the Company ?

(Objected to upon the ground that no parol evidence of any previous conversations, stipulations, or agreements, with Warren S. Porter in relation to the procuring of this insurance can be introduced. Question withdrawn.)

(Adjourned until 2 P. M.)

2 P. M. Direct examination of Electa L Waters resumed.

Q. (By Mr. Hoyt.) State, if you know, what was the date of the del.very of the first policy, and by whom it was delivered.

A. It was the 4th day of July, 1881, and it was delivered by Mr. Warren Porter.

Q. How do you know that it was the 4th day of July?

A. It was the Monday evening after the shooting of Garfield, and our conversation after we were through with the policy was over the terrible crime committed. It was after tea-time in the evening.

Q. Who was there at your house at the time Mr. Porter, the Manager of the Company, called?

A. Only my husband, Mr. McKnight and myself in the room.

Q. State all that occurred there.

(Objected to by Defendant. Objection overruled, to which Defendant then and there excepted.

A. Mr. Porter called to our house after tea-time, in the evening, and he was ushered into the library. After we had said "Good evening" to him, and he to us, and inquired about our families, he says: "I have brought you over this life policy." There was something said then about the payment, and he says: "Well, this takes effect now, on the delivery of this policy, and it is understood that our arrangements are going to be as we have arranged them before this." And then I think that I might have asked the question, someone asked the question, anyway, how the arrangements were, and he says: "You have until the 1st of September to pay this in, and if you are not ready to pay the money then, we will take your note." That was, in substance, all there was said about that.

Q. What, if anything, did he say as to the time which the note should run?

(Objected to by Defendant. Objection overruled, to which Defendant then and there excepted.)

A. He said he could have two, three or four months. He said if he was not ready with the money on the 1st of September, that he would take his note for two, or three, or four months. He says: "This matter is all right. I want you
51 in my Company." My husband said that he would not give any note until then, he thought very likely he would be ready to pay the money then, but if he was not, he would give a note at the end of that time.

Q. State what was done with the policy.

A. The policy was laid on the table. It was

laid on the library table, and my husband took it in his charge. I think he laid it in a drawer in his desk in that room. And at that time there was something said about his not having had a $10,000 policy, and he said: "I may be sorry that I have not made this a $10,000 policy," and he says, I have dropped another policy this year," and he talked it over some that evening with Mr. Porter about making it a $10,000 policy. Mr. Porter urged the matter that he should have it a $10,000 policy. In talking about this being a $10,000 policy, Mr. Porter said, "I am sorry you did not have a 10,000 policy," and Mr. Waters said, "I am now sorry myself that I did not have it a ten thousand, as I dropped that amount;" and Mr. Porter then said, "We can have that arranged and another policy made out," and Mr. Waters says, "Well I do not care about doing that, it will necessitate a physician coming here again, a good deal of bother, and let this go," and Mr. Porter urged him, I cannot give just his words, but he urged him to have another policy of five thousand made out, but I think it was not decided that night that he should have the other policy made out. I think it was decided the next day or two, but still I am not positive about that matter whether it was decided that night to have another one made out or not.

Q. State whether or not, when Mr. Porter left your house that evening, he took the policy away with him.

A. He did not. He left it in our library with Mr. Waters.

Q. State, if you can recollect, what was the date of the delivery made of the second policy.

A. The second policy was brought to our house on the Monday previous to our all going away for the summer, and it was on the 11th day of July. We all left home on the 14th day of July, and it was brought to our house on the Monday morning

52 before we left. It was the $4,000 policy. It was delivered to me. My husband was not at home that morning. I was called by Mr. McKnight from the lower part of the house, and went into the library and met Mr. Porter, and he handed the $4,000 policy to me, and I said to him that we were going away, and says I, "I suppose this policy is the same as the other, as far as pay is concerned?" He says "Yes, the same as the other, it is all arranged between me and Mr. Waters." And I took the policy and laid it on Mr. Waters' desk. This was on the 11th day of July, 1881.

Q. When did your husband die.

A. August 25th.

Q. State whether or not, between the time when these policies were delivered and the time when your husband died, any communications were received by your husband from the Insurance Company.

A. Yes, sir, there was a letter came. I do not know that I can tell the date, but it came after we returned from Chautauqua, which was on Friday, and it was between that time and the next Thursday, but I cannot tell the date.

Q. (Letter shown witness) I will ask you if that is the letter?

A. Yes sir, this is the letter that we received.

Q. Do you remember the date on which it was received?

A. No, I do not know that I can tell you what date it was received.

Q. (By the Court) Whom is that letter signed by?

A. It is signed by W. S. Porter.

Q. (By Mr. Hoyt) I will ask you whether since the beginning of this suit, you had any talk with Mr. Porter about this letter? (Objected to.)

A. No sir, never mentioned it.

Q. You were present at the former trial of this suit against the Insurance Company were you not?

A. Yes sir.

Q. You heard the testimony given by Mr. Porter did you not?

A. Yes sir.

Q. I will ask you who it was represented the Insurance Company in the negotiations with your husband for insurance?

A. Mr. W. S. Porter.

Q. I will ask you who it was delivered these policies to you?

A. Mr. W. S. Porter.

Q. You say you heard him testify on the last trial? (Objected to).

A. I did.

53 Q. Let me ask you whether, or not, this Mr. Porter, whom you say you heard testify on the last trial of this case, was the same Mr. Porter who delivered the policies of insurance to you and to your husband, and who made the statements in regard to the payment of the premium, which you have testified to?

A. He was the same person.

Q. Now I will ask you whether, or not, you remember what statements Mr. Porter made in regard to that letter on the trial of that case.

(Objected to. Received under objection, to which Defendant then and there excepted.)

A. His statement was that he authorized the writing of this letter.

Q. What, if anything did he say about the sending of the letter, or the authorization of the sending of the letter to your husband?

A. He authorized it done.

Plaintiff offered in evidence the letter referred to, of which the following is a copy, dated August 23d:

"Agency Department Union Mutual Life Insurance Company of Maine. Incorporated 1848. 153 Tremont Street, Boston Massachusetts. W. S. Porter, Manager Department of Northern Ohio. Room 2, 164 Superior Street. F. M. Winship, Clerk. Office hours, 10 A. M. to 4:30 P. M.

Cleveland, Ohio, August 23d, 1881.

A. J. Waters, Esq., 1719 Euclid Avenue:

Dear Sir—As per rules of the Company, I am obliged to send in the payment for your insurance

policy on the last day in this month. Will you please be on hand for me with the money? And greatly oblige. Yours truly,

W. S. PORTER.
Per F,"

Q. State, as near as you can recollect, about what time this letter was received by your husband, if you know of its being received by him.

A. Our mail comes up in the morning between eleven and twelve o'clock, or did at that time, it has been changed since, and this letter came to him before the dinner hour, and he was in his library writing when he received it. I carried the mail in to him.

Q. Was it on the 23d of August?

A. I could not tell you that. The date I
54 do not give you, but I give you the time of day it was received at our house. It was received before the dinner hour on the day that it was received, but I do not think it was on the 23d. I should think it was the 24th, quite likely. Most of our mail comes that way.

Q. State whether, or not, it was during the lifetime and health of your husband that it was received.

A. It was.

Q. State what, if anything, your husband did in the way of making an answer to that letter.

A. He looked the letter over, and he sat down and wrote his note for the amount of that premium, and enclosed it in an envelope.

Q. (Note shown witness.) I will ask you what that is?

A. That is the note that was written by my husband for this premium. I can now testify as to the date of the receipt of this letter, because he wrote this note immediately after receiving the letter, the same day. The note is dated August 24th. The note was written on the morning of August 24th.

Q. State whether your husband wrote any letter enclosing the note.

A. Yes sir, there was a letter that was sent with this note.

Q. (Letter shown witness) I will ask you to look at that and state if that is the letter?

A. Yes sir, this is his letter, written at that time.

The note referred to offered in evidence by plaintiff. The following is a copy:

$365.82.

CLEVELAND, O., August 24th, 1881.

Four months after date I promise to pay to the order of the Union Mutual Life Insurance Company, Three Hundred and Sixty-five Dollars and Eighty-two cents, at Ohio National Bank, Cleveland, Ohio.

Value Received.

A. J. WATERS.

Plaintiff also offered in evidence the letter referred to, of which the following is a copy:

"State Agency of the Continental Insurance Company of New York, Eastern and Western Division, 1719 Euclid avenue:

CLEVELAND, O., August 24th, 1881.

FRIEND PORTER:

Policy 73,621, Premium $159.40 and Policy 73,549 Premium $199.25, total $358.65 is about due. I have added interest for four months, and enclose you my note for $365.82 for premium. Trusting the same is satisfactory, I am, Truly yours,

A. J. WATERS.

Q. What day of the week was that sent, if you know?

A. He died on Thursday, the 25th, and this must have been on Wednesday.

Q. When next did you see this note?

A. On the Monday after his death.

Q. On the 29th of August?

A. Yes sir.

Q. I will ask you how that came to you—how you got it?

A. Came through the mail.

Q. Was it in an envelope?

A. Yes sir, in a plain envelope. (Envelope shown witness.)

Q. Examine that, if you please, and state whether or not that is the envelope.

A. Yes sir, I should think it was.

Q. State whether there was any letter contained in the envelope.

A. There was nothing in it but the note.

Q. That is the envelope, and that is the note.

A. Yes sir, I should say it was.

Q. What, if anything, did Mr. Porter testify on the former trial of this case in regard to the sending back of this note? (Objected to. Received under objection. To which defendant then and there excepted.)

A. He said that he sent it back.

Q. You say you received that when?

A. On Monday between eleven and twelve o'clock, after the death of my husband.

Q. When was your husband buried?

A. He was taken to the vault on Saturday, but not buried for some time afterwards.

Q. State what, if anything, you did on Monday or on the Tuesday following.

A. I received this note between eleven and twelle o'clock, and immediately after dinner I went down town secured the money, and went to the office of this Union Maine Company, and tried to tender the money. (Objected to by defendant upon the ground that under the pleading in this case averring payment no evidence of waiver is admissible. Objection overruled. To which defandant then and there excepted.)

Q. Was it on Monday that you went down to the office.

A. On Monday afternoon.

Q. Did you take the exact amount of money there?

A. I did. I went directly from my house to Henry Rouse's office, my husband's old office, and showed him the note. I had two days' or one days' time to pay that in money before the note was

due, and I got the legal tender and tried to tender that money to the Union Maine Company through their agent Mr. Warren Porter.

56 Q. Who was at the office—was anybody there?

A. There was a lady in the office, and I do not know whether there was a colored man in the office when I went in or not, but I did not find Mr. Porter.

Q. State whether or not you made any tender to this lady. (Objected to. Objection overruled, to which defendant then and there excepted.)

A. I did not.

Q. What did you do?

A. I went twice to the office myself, and could not find Mr. Porter in, and I was tired going up to the office and I asked Mr. Henry Rouse to go there. Mr. Rouse went once to the office. There was another party went for me. Then I took the money and went home with the money, legal tender, with me, thinking that I would see Mr. Porter at his home that evening, and in the evening about nine o'clock I had the coachman that I had.— (Objected to. Objection overruled, to which defendant then and there accepted). About nine o'clock in the evening we tendered Mr. Warren Porter this money.

Q. (By Mr. Wilcox) Were you present at the time this tender was made?

A. I was not. (Mr. Wilcox) Then I object to it.

Q. (By Mr. Hoyt) You may that and state what that is. (Insurance policy shown witness.) Ob-

jected to on the ground that the paper will show for itself, objection overruled. (To which defendant then and there excepted)

A. This is a policy. This is the first one that was delivered, and it was delivered to our house on the 4th day of July, in the evening.

Q. State whether or not that premium receipt and this policy wer delivered at the same time?

A. They were.

Q. State whether or not the whole paper as it was delivered?

A. It was, just as it is. Mr Porter took this receipt and said to Mr Waters, "Your insurance takes effect from this night, and here is the receipt attached to the policy." (Answer objected to, objection overruled, to which defendant then and there excepted.) Plaintiff offered in evidence policy of insurance for $5,000 from the Union Mutual Life Insurance Company to A. J. Waters. Objected to unless accompanied by an offer of the application, as the application is a part of the Insurance contract. Received under objection. To which defendant then and there excepted.

57 Q. You say there were two policies of insurance given, one for five thousand and one for four thousand?

A. Yes, Sir.

Q. I will ask you if you know how many applications were made?

A I never knew of but one.

Q. I will ask you whether or not the policy which you testified was delivered on the 11th day

of July, was exactly the same as that policy, with the exception of a change in amount and date?

A. That was all the difference, the amount was $4,000, and the date was different.

Q. Do you remember what that date was?

A. I have forgotten the date.

Q. I will ask you whether or not that $4,000 policy which was delivered on the 11th day of July, had a premium receipt appended to it as this has?

A. It had, exactly like it.

Q. And a yellow strip also?

A. Yes sir.

Q. The papers then, as I understand, were identical?

A. Yes sir, perhaps the amounts were different, but the receipts looked just alike. (Plaintiff offered in evidence insurance policy for $4,000, issued by the defendant Company to A. J. Waters. Objected to by defendant unless accompanied by an offer of the application, as the application is a part of the insurance contract. Received under objection, to which defendant then and there excepted.) Counsel for the defendant admit that there is a $4,000 policy issued by the defendant Company to A. J. Waters, with a premium receipt attached, differing from the $5,000 policy only in date. The execution of the policy is admitted.

NOTE.

For Copy of Policy See Page 212—A. &c., Clerk.

CROSS-EXAMINATION BY MR. WINSHIP.

Q. How long have you lived in Cleveland?

A. Since 1870.

Q. And have lived on Euclid avenue most of that time?

A. Lived on Enclid Avenue since 1875, I think, I will not be positive.

Q. How long have you known Mr. W. S. Porter?

A. I think we made his acquaintance the first year we lived in the city, still I would not be positive about that.

Q. Had you lived near him?.

A. Yes sir.

Q. How far from him?

A. He has changed places several times,
58 sometimes nearly a mile and a half from him.

Q. At about the time he had these conversations that you speak of in relation to the insurance how near to you did he live?

A. He lived on Bolton avenue, perhaps a square and a half or perhaps only one square from us.

Q. You were acquainted with his wife?

A. Yes sir.

Q. When did you first get any knowledge of Mr. Porter's application to Mr. Waters for insurance?

A. Mr. Porter stopped Mr. Waters on Euclid avenue when I was with him and solicited him to become a member of this Insurance Company.

Q. Do you know whether Mr. Porter represented any other life insurance companies than this?

A. I do not.

Q. Did you never know him to solicit your husband for other Companies?

A. I do not remember it now.

Q. What time of day on the 4th of July did Mr. Porter come to your house with the first policy?

A. It was after tea. I could not tell you just the time.

Q. And your tea hour how is about what time?

A. About six.

Q. So that it was after six o'clock in the evening was it?

A. I think it was, and still it might be a little earlier, we were not always very punctual.

Q. Could it have been before five?

A. Well now, I could not tell you. I would not say. When we are there alone we are very irregular.

Q. Could it have been before four o'clock.

A. I should not think it was.

Q. Would you be absolutely certain it was after two o'clock?

A. I shoud say it was.

Q. Was it after twelve o'clock at noon?

.A This policy was delivered to our house in the evening. If I am not very much mistaken it was after tea. That is my memory of it now. It was after the shooting of Garfield. That was the topic of conversatiou after the policy was through with.

Q. If it was in the evening, it must have been after twelve o'clock at noon, must it not?

A. Oh, yes I suppose so. I always thought it was

on Monday evening, and I still think it was Monday evening, but I have thought that it might be that Mr. Porter brought that into our house on Sunday evening, but still I could not say that.

59 I will not say that it was Monday evening for a certainty, but I think it was.

Q. Will you answer the question? On what date was that policy delivered?

A. It was brought to us on the evening after the shooting of Garfield, and I have always thought it was Monday evening, and still I might possibly be mistaken on that point. It might have been Sunday evening, I will not be positive about that.

Q. Might it not have been Tuesday evening?

A. It possibly might have been.

Q. Might it not have been Wednesday evening?

A. I hardly think as late as that, but still I am liable to mistakes, but I am confident it was brought to our house in the evening.

Q. How many times during that week was Mr. Porter at your house?

A. I could not tell you. I think he was only there just one time in that week, and still it seems to me he was in our house after that.

Q. Was he there very frequently?

A. Yes sir, he was there frequently at our house during that summer.

Q. About this time how frequently was Mr. Porter at your house?

A. I could not tell you. He was there sometimes twice a week and sometimes once a week, and I could not tell you positively about that. He was

a very familiar neighbor and ran in quite often.

Q. Was he there two or three or four times in the first week of July?

A. He might have been.

Q. Was he there in the evening each time?

A. I could not say that. It is very hard to remember when a neighbor drops into your house. He was to our house very often that summer.

Q. Are you absolutely certain that that was the 4th, 5th, 6th, 3rd or 8th of July? Can you fix a limit under which you would be certain, so that you could testify positively?

A. I would fix a limit, that it was after the 2nd. It was after the shooting of Garfield, and beyond that I will not testify.

Q. Was there any other evening when Mr. Porter was there and had conversation in relation to it?

A. Not so pointedly as that was. That evening we were all talking about this matter.

Q. Were there any other evenings that Mr. Porter was in your house during the week on which you discussed the events of the day?

60 A. There might have been.

Q. Do you think there were?

A. I would not be positive, there might have been.

Q. The shooting of Garfield was a very prominent topic of conversation, was it not, at that time in all the families in the city of Cleveland?

(Objected to.) Objection overruled, to which plaintiff then and there excepted.

A. Oh, yes it was.

Q. How soon after that time did you see Mr. Porter again?

A. It was not more than a day or two after that that I saw him,—after the first policy was delivered I saw him every day or two.

Q. How soon after that did you see him in relation to the other policy?

A. I could not tell you the dates.

Q. Did you see him again from the time you say he had this conversation and delivered the first policy until the second policy was brought to you?

A. I think I did, but still I won't say positive about that.

Q. Did you have any conversation between that time and the time the second policy was delivered?

A. Yes, sir, I think I did.

Q. Then if you did, you must have seen him?

A. Yes, sir, I know that I must have seen him.

Q. When or where was it?

A. I could not tell you whether it was at our house or at his house. I often dropped into his house.

Q. When, before the delivery of this first policy did you see him and have a talk with him about insurance?

A. I saw him a good many times. He was to our house very often until he got Mr. Waters to say he would take the policy: *very* often.

Q. Did you see Mr. Porter between the 10th of June, the evening that this examination was made at your house, and the time he delivered the policy?

A. Why I think I did. Oh, yes, I know I did.

Q. Did you at any time at those interviews say anything to him in relation to the policy, where it was,—ask for it?

A. I do not know about that. I think it might have been spoken of.

Q. Do you have any recollection that it was?

A. Just make that a little more pointed, what you want.

Q. Between the 10th of June, or I will fix it on the evening on which Mr. Waters was ex-
61 amined by Dr. Shepherd, and the third or fourth of July, or whatever day it was that he delivered this policy, did you meet Mr. Porter to have any talk with him about the policy?

A. I think I did.

Q. When was that?

A. I cannot tell you the date, but I remember very well saying to Mr. Porter, "Husband has almost made up his mind to take out the rest of that insurance." I am confident that was said at some time.

Q. Have you any idea where or when?

A. I would not say whether it was at my house or his.

Q. Did you at that time ask him where the first policy was?

A. I do not know that I did.

Q. Would you say that you did not?

A. I could not say whether I said anything about the first policy or not.

Q. Did you meet him very frequently?

A. Oh, yes we met him very frequently.

Q. And talked with him in relation to it?

A. I do not know that I always talked with him about this matter; I do not think I did every time.

Q. Were you acquainted with Mrs. Warren S. Porter?

A. Oh, yes.

Q. Did you ever say to her that you wished to see Mr. Porter in relation to some more insurance?

A. I do not know that I ever did; I might have.

Q. Did you ever go to Mrs. Porter's house and ask Mrs. Porter to send Mr. Porter to you, that you wanted some more insurance on your husband's life?

A. I do not know that I ever did: might have been that I did.

Q. Do you know Mr. Porter's daughter, Cora?

A. Yes, sir.

Q. Do you know his son?

A. Yes, I think I would; I have not seen him very much lately.

Q. They lived together at that time?

A. I believe they did.

Q. Did you or not, go there to Mr. Porter's and in the presence of his family say to him that you wanted some more insurance on your husband's life, and that you would pay for it if your husband did not?

A. No, sir; at least I do not know that I did. We had conversations about oil paintings that I must tell right here. As Mr. Porter had of-

62 fered to take an oil painting in part pay for this premium, I might have said that I would

pay that amount in that way.

Q. Did you say to her: "Send your husband over, I want some more insurance." ?

A. Well, I cannot tell you for a certainty that I said just those words.

Q. In response to that, if you made it, did Mr. Porter come to see you?

A. That I could not tell you. He was there back and forth very frequently after this insurance, and there was a great deal of talk about it.

Q. Did Mr. Porter come on that same evening and say to you that his wife came down for him and he came up to see you at your request?

A. No, I do not remember anything so imperative as that.

Q. Will you say that he did not come to see you about it?

A. He has said a good many times he would take an oil painting in part payment for that premium.

Q. The question is, did Mr. Porter come to you on the evening of the day that you went to Mrs. Porter's, if you were there?

A. Bless you, I could not tell you anymore about that than anything in the world.

Q. And did he say to you that he had come in consequence of the request you left with his wife?

A. No, I do not know anything about that whether he did or not. He might have and he might not.

Q. Is it true that his coming to see you at that time was because you wanted to take out more in-

surance on your husband's life that you agreed to?

A. I did not make that bargain for more insurance. My husband made it.

Q. Did you talk with him about it?

A. Oh, yes, we talked about the insurance a good many times.

Q. But you did not make that agreement with him personally?

A. What agreement?

Q. To take out the additional four thousand of insurance?

A. I do not know that I did. I might have helped the matter.

Q. When was the first conversation your husband had with Mr. Porter, to your knowledge, as to the four thousand dollar policy?

A. There never was anything but a ten thousand dollar policy talked of until about two or three weeks before he decided to have an insurance taken out, then he simmered it down to five thousand, saying he could not carry the ten. There
63 was no four ever named, that I know of, before that.

Q. When was the first time, so far as your knowledge extends, that Mr. Porter and your husband talked of the four thousand dollar policy?

A. I think it was after he was examined, but still I am not willing to swear to that positively. I think it was after he was examined. He decided then to take the five thousand, and I think it was soon after that, that he said: "I am sorry I did not take out the ten thousand."

Q. I am not asking you for the conversation between you and your husband, but the conversation between Mr. Porter and your husband in your presence.

A. I cannot tell you the date.

Q. When did he decide to take out that four thousand?

A. Some time after he was examined, between that time and the day of the delivery of the other. It was between those times.

Q. You are certain about that, are you?

A. I feel quite positive about it, and still it might not have been decided on until the night that the five thousand was delivered.

Q. Then it was talked over that night, was it?

A. Yes, Mr. Waters said to Mr. Porter in my hearing, that he is sorry that it was not the ten thousand. That is the night that it was delivered. And then it was that Mr. Porter suggested the idea of taking out the rest.

Q. And your husband said something about the necessity of another application?

A. He would not bother with it then, let it alone awhile as it was. I cannot just recollect. I cannot tell just the words, but that was the idea, that he would not take it then.

Q. Did he decide that night that he would take it?

A. I cannot say. Anyway it was made out after that.

Q. If he did not decide that night, that he would take the additional four thousand, do you know when he did decide?

A. I do not know when he told Mr. Porter to make it out. If he did not decide that night, I can not tell when he did decide.

Q. Then if it was not decided that night, you were not present when the decision was made?

A. No, but it is my impression that it was decided that night when it was delivered.

Q. If it was not decided that night, you
64 were not present when it was decided?

A. Well, I cannot tell you. I was present almost every time he was in my house. I do not think he was hardly ever in there but what I was with them.

Q. You have no recollection of any other conversation after that between them?

A. I do not think there was any evening that he was in there but what this matter was spoken of.

Q. After this time that this first policy was delivered, do you remember of seeing Mr. Porter in your house until the second policy was left there?

A. I would say from my best recollection that he was in there after that.

Q. But you have no recollection of any particular time that he was there?

A. I do not know as I can say as to any particular time.

Q. I understood you to say in your direct examination that your husband was ailing somewhat a few days before his death,—how long before his death?

A. He was not very well from Saturday after our return from Chautauqua.

Q. Did he have a physician?

A. He was taken slightly ill on Saturday night by overwork, and we did not call in a physician, he did not want any at all; but I said we would have one on Tuesday, and we had one on Tuesday.

Q. And you had no physician at your house until Tuesday?

A. No, sir; no physician.

Q. Who was that physician?

A. Dr. B. P. Brown.

Q. Is he here in the city now?

A. Yes, sir.

Q. How many times was he there on Tuesday?

A. Usually on his run out to East Cleveland he was there morning and evening.

Q. Was he there on Wednesday?

A. I think he called morning and evening as he was passing by.

Q. Was he there on Thursday?

A. He was at that time treating me and he called to see me, and I think he prescribed for him each time, but I am not certain about that.

Q. You are certain he did not come to see your husband, but came to see you?

A. No, I did not say that. He was treating me at that time.

Q. He was called to see your husband?

A. He was called to see my husband on Tuesday.

Q. And he was not called to see your husband on Monday?

A. No, sir.

Q. Was he there on Thursday?

A. He was called on Thursday at noon. He called in the morning on Thursday and my
65 husband was writing in the library, and he was so much better that he was not going to come anymore, and Thursday, about one o'clock I sent for him.

Q. What time did you say your husband died?

A. August 25th, at midnight.

Q. Was it Thursday night or Friday morning?

A. Thursday night at midnight, two minutes to twelve.

Q. It was between the days of Thursday and Friday?

A. It was just two minutes to twelve when he stopped breathing.

Q. I understood you to say in your direct examination that Mr. Waters gave as a reason why he wished he had made the application for ten thousand instead of five, that he had dropped ten thousand of insurance?

A. Yes, sir, he had that spring.

Q. How much insurance did your husband take between the time this application was signed and the time this policy was delivered?

(Objected to by plaintiff, objection sustained, to which defendant then and there excepted.)

Q. Do you know Mr. Hutchinson, an insurance agent here in the city,—agent of the Aetna Life?

A. I think I know of such a man.

Q. Did you ever go to him and solicit him to take an application on your husband's life?

(Objected to by plaintiff.)

The Court.—You may answer it, if you want to. To which plaintiff then and there excepted.

Witness.—I would like to answer that question. My husband for years was insured in the Aetna Insurance Company, and the insurance was given to another agent, this eight thousand of insurance was given to another agent, and I think it offended very seriously Mr. Hutchinson, and there was talk over this matter between Mr. Hutchison and me, but I could not go on to tell you all that was said.

Q. Did you send for Mr. Hutchison before that eight thousand application was taken?

(Objected to, objection sustained, to which defendant then and there excepted.)

Q. I will ask you if the eight thousand of insurance that was taken out in the Aetna, was not taken out after you had this controversy with Mr. Hutchison?

(Objected to, defendant offered to prove that other insurance was taken out by Mr. Waters between the time that this application was made, and the time that the policy was delivered, for the purpose of showing that Mr. Waters did not intend to take this policy.) (Offer ruled out, to which defendant then and there excepts.)

Q. How long after the ffrst policy was delivered, do you say the second policy was delivered?

A. The second policy was delivered to me on the Monday preceding the day that we left for Chautauqua, which made it the 11th day of July.

Q. Was your husband present when it was delivered?

A. He was not.

Q. How soon after that did you see Mr. Porter?

A. I do not think I saw him until after our return from Chautauqua; perhaps two months, six weeks, I cannot remember.

Q. What time did you return from Chautauqua?

A. We came back the 19th day of August, I think.

Q. About a week before your husband's death?

A. Yes sir, we came home on Friday night, if that is the 19th day of August, and I think it is.

Q. Was your husband attended by any physician while he was at Chautauqua?

A. No sir, he was not.

Q. Was he attended by any other physician than Dr. Brown while he was in Cleveland at that time during this week after his return?

A. Yes sir, when his congestive chill came on, I called Dr. Ashman first, he was our near neighbor, and we did not have time,and I was frightened and run for him, the nearest one. Dr. Brown was some distance away. We soon had him there, and we had Dr. Lukens and we had Dr. Schneider. We had four physicians there that day.

Q. The Dr. Schneider who lives on this side of the river?

A. It was the Dr. Schneider that lives on Prospect street that we had.

Q. (Envelope shown witness.) Is that your handwriting, Mrs. Waters.

A. I should think it was.

RE-DIRECT EXAMINATION BY MR. HOYT.

Q. The envelope that was just shown you, you say what is written on it is in your hand-writing?

A. Yes sir.

Q. Look at the date on that envelope, please. What is the date of it?

A. August 24.

Q. State what was sent in that envelope, if you know.

A. The note and the letter that Mr. Waters wrote to the Company.

Q. The Company that you have testified about?

A. Yes sir.

Q. This note and this letter that we introduced in evidence was enclosed in that envelope?

A. Yes sir, may I explain?

Q. Yes, go on.

67 A. My husband directed an envelope and sent it around by our coachman to Mr. Porter's house, and the house was closed up, and he brought the letter back to our library. (Answer objectee to.)

The Court. You can tell why you directed that.

Witness. Because my husband was in the kitchen fixing the water pipes to the range. We had been away from home and they were out of order, and the coachman came back and the house was shut up. My husband said to me, "Go into the library."

Q. (Interrupting.) You did direct that letter, did you?

A. I directed that letter to Mr. Porter's office.

Q. And you directed it at Mr. Water's request? (Objected to as leading.)

Q State whether or not Mr. Waters requested you to direct that envelope?

(Objected to, objection overruled, to which defendant then and there excepted.)

A. He did.

Q. State whether or not on the 24th day of August, your husband did address an envelope which originally contained that letter and note?

A. He did.

Q. I will ask you to what place the first envelope which your husband directed was addressed?

(Objected to, objection overruled, to which defendand then and there excepted.)

A. Mr. Porter's residence on Bolton Avenue.

Q. What did your husband do with the letter and the note which was put in the first envelope.

A. He gave me the letter and says, "Go into the other room and direct it to Mr. Porter's office."

Q. The first one I am talking about.

A. I presume I threw it into the waste basket, I do not know.

Q. What was done after your husband addressed the first envelope and enclosed this letter and note in it, which you say were enclosed in it?

A. He gave that letter to me and says, "Go and re-direct it."— The conversation between the witness and her husband objected to by defendant.

(Objection sustained.)

Q. I mean the first one that you say was addressed to Mr. Porter's house. What did your husband do with that?

A. He gave it to me.

Q. What did you do with it?

A. I opened it and put it into this envelope.

Q. Put what into this envelope?

A. The letter and note—and he told me where the number was and I directed to the number that he told me.

Q. And why was it necessary to direct a second envelope?

(Objected to for the reason that it is calling
68 for a conversation between the witness and her husband.

Q. *By the Court.* To whom did you direct the letter?

A. I directed it to his office on Superior street.

Q. In the first place, did the other letter come back?

A. It came back.

Q. (By Mr. Hoyt.) What was your husband doing when the first letter came back?

A. He was working at the pipes on the range when that came back. The coachman gave it to him, and he gave it to me, and he says, "Go into the library and direct that to Porter's office, and I did so.

Q. Mr. Winship has asked you on your cross-examination quite a good deal in regard to conversations and meetings, and all that sort of thing that you and your husband had with Mr. Porter. When did those interviews begin?

A. The first was in February I think.

Q. Where was it?

A. On Euclid avenue. Mr. Porter stopped my husband and I as we were riding home from town —stopped our carriage and came up to the carriage, and after shaking hands with him and asking after his health and so on, he said he had a new company to work.

(Objected to by defendant, objection sustained, to which plaintiff then and there excepted.)

Q. Where did you see him next?

A. At our house.

Q. How soon after that was it?

A. I could not tell you exactly how soon, I should think, perhaps, may be it might be a week.

Q. What, if any, request was made by him then?

(Objected to by defendant, objection sustained, to which plaintiff then and there excepted.)

Q. Mr. Winship has asked in you regard to the illness of Mr. Waters. When did that illness begin?

A. His final illness?

Q. Yes.

A. It appeared serious on Tuesday morning.

Q. When did you get home from Chautauqua?

A. On Friday evening.

Q. How was his health while you were at Chautauqua?

A. Splendid, just as good as could be.

Q. How was it when you returned home on Friday evening?

A. He made the remark as we left the cottage that he never felt better in his life.

(Answer objected to, and motion by defendant's counsel to strike it out. Motion granted, to which plaintiff then and there excepted.)

Q. You say that on Friday when you returned, your husband's health was good?

69 A. It was.

Q. How was it on Saturday?

A. It was so that he worked very hard all day Saturday.

Q. How was it on Sunday?

A. He had overworked, not quite so well.

Q. What was the matter with him on Sunday, if anything?

A. He had eaten a very queer supper on Saturday night and it upset his stomach.

Q. What did he eat?

A. Warm bread and butter, and tomatoes with vinegar, and then drank a bowl of milk. That was his supper.

Q. What was he suffering from on Sunday?

A. A sort of a Cholera Morbus, just slight.

Q. How was he on Monday?

A. So that he wrote fifty business letters on Monday.

Q. What was his health on Monday; was it good?

A. Yes, comparatively good. He was better than on Sunday.

Q. How was his condition Tuesday?

A. Well! Monday night or Tuesday morning he seemed a little worse.

Q. Let me ask you whether or not he had a diarrhea connected with this?

A. He had.

Q. Explain to the Jury about the calling in of the physician that Mr. Winship has enlarged upon.

A. Well, I had nsed several little remedies and I did not see that I had checked his diarrhea at all, and I sent for a physician Tuesday morning. That is about all there is to it.

Q. The physician came there?

A. He came.

Q. What time did he come Tuesday morning?

A. I should think about nine o'clock in the morning, or might have been a little earlier and might have been a little later. I should think it was about nine o'clock.

Q. You say that your husband's health on Wednesday was better. How was it on Tuesday night?

A. On Tuesday he was well enough that he wrote eighteen letters.

Q. On Wednesday you say he was better?

A. He was well enough on Wednesday so that he wrote eight business letters and done considerable work around the house.

Q. How was he on Thursday?

A. He was so that he wrote two letters on Thursday, and was around the house until after dinner.

Q. What was his condition as to appetite, and all that sort of thing, on Wednesday and Thursday?

A. It was not very good, his appetite was not.

Q. What was his condition beginning
70 with the time that he began to mend and ending on Thursday noon?

A. He was gradually growing better.

Q. Until what time was he gradually growing better?

A. After the dinner hour on Thursday.

Q. State what occurred after dinner on Thursday.

A. He took a bath on Thursday after dinner and gradually grew worse from that.

Q. When did you first see him after he had taken his bath?

A. He called me to him while he was taking his bath.

Q. What was his condition when you went into the bath room?

A. I could not state that exactly. The physician maybe, could tell better than I. But he went into the bath room and he had his clothing on when I went to him. He had got through with the bath, but was in a chill. I do not know that he had all of his clothes off. I do not know that. I do not know whether he had them all off or partly off, but he had had a bath and was in a chill when he called me to him; and after he laid down on the bed, I took off his pants myself after he was in bed, after the chill came on.

Q. Was he in bed on the Saturday previous?

A. No.

Q. Was he in bed on the Sunday?

A. No sir, not at all.

Q. He was not in bed at any time, excepting at night, up to Thursday noon?

A. Not at all up until Thursday noon.

Attached to this deposition were two envelopes, one of which is as follows.

A. J. Waters, State Agent, Eastern and Western Departments Continental Insurance Co., of N. Y., 1719 Euclid Avenue, Cleveland, Ohio. Return if not callen for in 10 days.

Cleveland, Ohio. August 24, 7 P. M.

WARREN S. PORTER, ESQ.,

ROOM 2, NO. 164 SUPERIOR ST.,

CLEVELAND OHIO.

(Identified as Mrs. Water's handwriting.) The other envelope as follows:

Cleveland, O. Aug. 27, 7 P. M.

A. J. WATERS, ESQ.,

1719 EUCLID AVENUE,

CLEVELAND, OHIO.

71

DEPOSITION OF G. J. McKNIGHT,

A witness on the part of the plaintiff, being duly sworn, testified as follows:

Q. (By Mr. Hoyt.) Where do you reside?

A. I reside in the city.

Q. How long have you lived here?

A. Between seven and eight years.

Q. Do you know the plaintiff in this case, Mrs. Waters?

A. Yes sir.

Q. Did you know Mr. A. J Waters in his life time?

A. Yes sir.

Q. How long had you known Mr. Waters previous to his death?

A. I must correct my statement about living here. I have probably known Mr. Waters between seven and eight years. I have lived here really longer than seven or eight years, I know Mr. Waters probably about seven or eight years.

Q. I will ask you if you have any acquaintance with Warren S. Porter?

A. Yes sir.

Q. Did you know him in the Spring and Summer of 1881?

A. Yes sir.

Q. Where were you residing in the Spring and Summer of 1881?

A. I was residing at Mr. Water's house, making it my home.

Q. I will ask you whether or not you have any

recollection of Mr. Porter coming there with a policy of insurance, and if so, about when was it?

A. I remember when he called there at the house with the policy of insurance.

Q. What was the amount of that policy, do you recollect?

A. The first one was a five thousand dollar policy.

Q. Do you remember the time when it was that he called with that policy?

A. Yes sir, it was the Monday following Garfield's shooting.

Q. And what time in the day was it, if you can remember?

A. It was in the evening about tea time.

Q. Did he come into the room?

A. He came into the library.

Q. Who was there?

A. Mr. Waters, Mrs. Waters and myself.

Q. What did Mr. Porter do there?

72 (Objected to by defendant. Objection overruled, to which defandant then and there excepted.)

A. Mr. Porter came into the library and took the policy out of his pocket, and threw it down on the library table—Mr. Waters' writing table—and said, that there was his policy of insurance, something to that effect, that it had been lying on his table for a week or so, and he had forgotten about it.

Q. On whose table?

A. On Mr. Porter's table. He had forgotten

about it, but it was all right anyway, and went on to say he could pay the premium by the first of September, and if he was not ready then, why, he would take his note for three or four months.

(Objected to by defendant. Objection overruled, to which defendant then and there excepted.)

(Mr. Wilcox.) This is all under objection, we object to all this testimony.

(The Court.) It is so understood, but you can renew your objection if you want to.

Q. (By Mr. Hoyt.) What, if anything was said by Mr. Porter in regard to whether or not the policy would take effect from its delivery?

(Objected to as leading. Question withdrawn.)

(The Court.) Tell all that took place.

(Witness.) Well, as I said before, Mr. Porter drew the policy out of of his pocket and threw it down on Mr. Waters' table. Mr. Waters was sitting there writing, and he remarked as he took the policy out of his pocket, "This has been lying in my desk for a week or so, I had forgotten about it but it does not make any difference, the policy is all right, the receipt is attached to it and it is all right, and if you are ready to pay by the first of September all right, and if you are not, I will take your note for three or four months.

Q. (By Mr. Hoyt.) That is all you remember about the conversation?

73 A. There might have been more conversation, I cannot go on and detail all of the conversation, but that was the sum and substance of it concerning the policy. There were other conversa-

tions there in regard to Garfield's shooting, and so on.

Q. Was anything said by Mr. Porter as to the policy not going into effect until the premium was paid?

(Objected to as leading. Objection overruled, to which defendant then and there excepted.)

A. No sir, there was not anything said about that at all, Mr. Porter said the policy was in force from date. The date was given in the policy, it was written in the policy. Mr. Porter said that the policy was perfectly good from the day of the writing of it. He kind of apologized for his negligence in not delivering the policy.

Q. Were you in the house when the second policy was delivered?

A. Yes sir.

Q. What do you know about that as to what was said, or anything that may have been said by Mr. Porter when that second policy was delivered?

(Objected to by defendant. Objection overruled, to which defendant then and there excepted.)

A. Mr. Porter said that that policy was delivered on the same terms as the first one. Mrs. Waters called his attention particularly to the fact that they were going away to Chautauqua, and probably be short of money, that is, they expected to use considerable money, and she wanted it thoroughly understood, and Mr. Porter said, all right, the terms were the same as the first one.

Q. What date was that, if you recollect?

A. That was July 11th.

Q. What time in the day was it?

A. It was in the morning.

Q. Now Mr. McKnight, coming down to a later time than that, what, if anything do you know about any tender that was made here?

(Objected to by defendant. Objection
74 overruled, to which defendant then and there excepted.

A. I know the fact that a tender was made, because I made it myself.

(Mr. Wilcox. This is under objection.

Q. (By Mr. Hoyt.) Tell us what took place.

A. Mrs. Waters handed me the money to make a tender.

Q. What date was that?

A. That was the 30th of August.

Q. Do you remember what day of the week it was?

A. It was the Monday, I believe, following Mr. Waters death. The tender was made at Mr. Porter's house in the evening.

Q. State whether or not you went to Mr. Porter's office.

A. I went the day following to Mr. Porter's office.

Q. Did you go on that day, that Monday?

A. Yes sir, I did go on that Monday, I went there and Mr. Porter was not in.

Q. Who was in?

A. Well, now, I wont say positive, I will recall that, I wont state that as a positive statement that I went to his office on Monday, I do not recollect that, I aint sure of that.

Q. What was done Monday night in regard to the tender that you know of?

A. I went to his house Monday evening. It was about 9 o'clock in the evening.

Q. Did you have the money with you?

A. I had the money with me.

Q. Do you remember what amount it was?

A. I believe it was $358.65, I have a memorandum of it some place.

Q. And when you went to Mr. Porter's house who did you see?

A. I did not see anybody but Mr. Porter. They were evidently about retiring.

Q. About what time was it?

A. I was about 9 o'clock in the evening.

Q. Who went with you?

A. Mr. M. T. Hower went with me.

Q. Who else.

A. That was all. Well, I wont say that, I think Mrs. Water's coachman was out side. He was around there some of the time, but he did not go into the house, though, if he was there at all.

Q. You went to the house, and what did you do when you got there.

A. The door was standing open and we knocked, or I knocked. Mr, Porter came down partly undressed, and the parlor door was standing open and, as if by common consent, or rather he motioned us into the parlor, and we went in, and I called Mr. Porter's attention directly to our purpose in coming there, to make him a tender of that money, and he accepted it as a tender, but he refused.

(Mr. Wilcox.) State what was said and done.

(Witness.) I simply said that we came there to make a tender of that amount, $358.65, and he accepted the tender.

Q. (By Mr. Wilcox.) What did he do or say?

A. He said, "I accept the tender." He acknowledged it as a tender of the amount, but refused to accept the money—take it.

Q. (By Mr. Hoyt.) What, if anything, did he say about going down to the office?

A. Did not say anything.

Q. What did you do after that?

A. I went home after that; that evening.

Q. What did you do the next day?

A. The next day we went to the office, Mr. Hower was along with me. We went there about one o'clock and made the same tender.

Q. Whom did you find there?

A. I believe there was Mrs. Winship there.

Q. What did you do with the money?

A. Left it on the desk there.

CROSS-EXAMINATION BY MR. WINSHIP.

Q. You say you left the money on the desk. Anybody present beside Mrs. Winship.

A. I do not remember particularly that there was, might have been several.

Q. Do you remember that there was not?

A. I do not remember particularly, I say, that there was not, or that there was.

Q. Did you ever see that money afterwards?

A. No sir, I never did, to my recollection.

Q. Do you swear positively that you did not go up into that office yourself after that and take that money?

A. Yes sir, I do.

76 Q. And did not stop on the stairs and count it as you went down?

A. I did not take that money sir.

Q. And did not say to Mrs. Winship that you thought she was rather hard not to accept the tender the second time that you went in there with it.

A. The second time when I went in there?

Q. Did you not go in there and say that to her, and take that money off the desk and carry it out of the office?

A. I might have went in. I do not remember positively.

Q. Did you not take that money off the desk where you left it and take it out of the office.

A. No sir, I won't swear that I did.

Q. Will you swear that you did not?

A. I rather think that I did not.

Q. Would you not know it if you did go in there and take it out?

A. Oh yes, I think I would.

Q. Do you say that you did, or did not?

A. I did not do it.

Q. Did you ever see that money afterwards?

A. No sir.

Q. You testified in the former trial, did you, here?

A. I did.

Q. Did you testify at that time that you were

present when only one of these policies was delivered?

A. I testified I was present when both of them were delivered.

Q. Answer my question?

A. I wont say what I testified as to that. I know actually as a fact that I was there when both of them were delivered.

Q. Did you testify on the former trial that you were present when only one of these policies was delivered?

A. I do not remember about that.

Q. Did you testify that you did not know which one of the policies it was that was delivered when you were present?

A. I know which one was delivered first.

Q. Did you testify positively at that time that you did not know?

A. I won't swear what I did testify to. I have not got the notes before me.

Q. At that time it was one year or more nearer the transaction was it not?

A. Yes sir.

77 Q, Was your recollection as good then as it is now.

A, Certainly, it ought to be, naturally.

Q- You were not sick at that time? Had no head trouble?

A. I would not swear to that, it might be possible that I had some head trouble.

Q. Where did you meet Mr. Porter when that four thousand policy was delivered?

A. I met Mr. Porter on the corner of Bolton and Euclid avenue and went with him to the house, when he delivered that policy, and I called Mrs. Waters up from below, from the basement. That is my testimony and I guess you will find it so there. Mrs. Waters came up and Mr. Porter delivered that four thousand dollar policy, and Mrs. Waters asked him particularly about the terms of that four thousand dollar policy. That is what I swore before, near about. Those are the facts, I won't say it is word for word. Those are the facts nevertheless.

Q. Did you swear at that time that you thought that policy was delivered in June?

A. I might have thought at that time that it was delivered in June, but it was not though.

Q. You say that the first policy was delivered on what date?

A. It was delivered on the fourth day of July in the evening, after tea time.

Q. What time would that be—after 6 o'clok?

A. Yes sir.

Q. You are positive that that policy was delivered by Warren S. Porter at Mrs. Waters' house, on the evening of the Fourth of July after 6 o'clock?

A. Yes sir, I am positive.

Q. Did you see Mr. Porter there on any other evening of that week?

A. I did see him there other evenings.

Q. Of that week?

A. I won't say of that week.

Q. Did you see him there any evening of the preceding week?

A. Yes sir.

Q. How many times?

A. Oh he had been there numberless
78 times. I could not begin to count them or keep any track of it.

Q. Was he there numberless times the week before?

A. Not that week before, but before the application was written, he was there mornings and evenings.

Q. I ask you the week before?

A. Well, I would not say it was numberless times the week before.

Q. How many evenings that week, commencing with Monday, the 4th of July, was Mr. Porter there at Mr. Waters' house?

A. I do not think Mr. Porter was at the house any other time after the first one until the second policy was delivered.

Q. You do not think he was not there from the time the first policy was delivered until the second one?

A. No.

Q. You did not see him there?

A. I did not see him there, from the simple fact that I was not there, I could not very well see him.

Q. Were you absent from the city?

A. I went away Tuesday morning; that is the Tuesday after the 4th, and I cannot say whether I returned that Saturday or not, I have my day-book, that will tell; I have not got it here,

Q. But you do not know whether Mr. Porter was there or not?

A. I cannot say as to that between the delivery of these two policies.

Q. There was a long conversation I understand you to say, in relation to the death of Garfield?

A. That was the conversation there in the evening when he delivered the policy.

Q. Did I understand you to say to say it was in relation to the death of Garfield?

A. I did not say any such thing, I did not say so.

Q. Where were you when Mr. Porter came in on this 4th of July evening?

A. I was in the house.

Q. What part of the house?

A. I think I was in the library when he came in.

Q. Who was in the library beside yourself?

A. Mr. Waters and Mrs. Waters.

Q- Who else?

A. That was all that I remember. Well, his son might have been in or his daughter, but I do
79 not think they were there to stay any length of time. They probably came in and went out.

Q. When Mr. Porter came in, what was the first thing he said according to your best recollection?

A. My best recollection is, that Mr. Porter came in, and just as though that (indicating) was Mr. Waters' library, he walked up to it, and drew the policy out of his pocket and said, "There's that

policy, it has been laying on my table for a week or so, and I forgot about it," and went on to state about the terms.

Q. What else was said?

A. He said, if he was not ready to pay for it by the first of September he would take his note.

Q. Mr. Waters had not said anything before he said that? He just drew it out and went right on and made that remark?

A. Yes, sir, he drew it out.

Q. Was that all that was said, that if he was not ready to pay it he would take his note?

A. Certainly, yes, sir. That was the principal part of what he said in regard to the policy and the payment of the premium. Then the conversation changed to other matters; other subjects.

Q. Le me see if I quote you correctly. Mr. Porter came into the library, pulled the policy out of his pocket, threw it down on his desk, and said that it had been in his office for a week, and says, "If you do not want to pay it I will take your note," and that was the substance of the conversation?

A. He did not say it was on his desk in the office, he said it was on his desk.

Q. Leave the office out that is the substance of the conversation, is it, as it occurred?

A. That is the general substance.

Q. Then you went on to talk about something else?

A. Went on to talk about Garfield.

Q. That was the first policy, the five thousand dollar policy, was it?

A. Yes, sir.

Q. The balance of the conversation that evening was in relation to the shooting of Garfield, was it?

A. Not altogether.

80 Q. There was nothing else said in relation to insurance?

A. Mr. Porter certainly mentioned something in regard to the delivery of the four thousand dollar policy?

Q. What other conversation took place, except what I have repeated, in relation to insurance, that night?

A. In what way?

Q. In any way.

A. In a general way?

Q. In a general way or any other way.

A. There was no reference to insurance business either fire or life. The only thing Mr. Porter may have said anything about, to my recollection, was that he would probably deliver the other policy in about a week or so, the four thousand dollar policy that he had written for Mr. Waters.

Q. Then, he had written another policy, had he?

A. Well I don't know whether he had written it or not. The Company had written it.

Q. At that time?

A. I do not know whether they had or not. That was the understanding that they had or were to.

Q. The conversation was that he would deliver the other policy in a few days was it?

A. In about a week or so.

Q. Can you state any other conversation that took place there that night in relation Mr. Waters' insurance?

A. There might have been some other conversation.

Q. Well was there? In relation to lapsed insurance in other companies?

A. I do not know but what they did refer to one company; Out there was not not particularly much said about that, or about the four thousand dollar policy.

Q. Is it not a fact that Mr. Porter was prevailing upon him then and there, and that night to take four thousand dollars more insurance?

A. I do not think it is.

Q. He did not that night, then, talk with him about taking four thousand more, and urge him to take four thousand more did he?

A. No sir.

Q. There was no conversation between
81 the two, looking to more insurance that night was there?

A. Not to my recollection.

Q. Would you not remember if there was?

A. I think I would, probably. That conversation had occurred before that date.

Q. Where were you when the four thousand dollar policy was brought?

A. I met Mr. Porter on the corner of Bolton and Euclid avenue, and went back to the house with him, and went into the front door and went and called Mrs. Waters, and she came up and came to

the library or front door, and Mr. Porter delivered the policy into Mr. Water's hands and Mrs. Waters then spoke in reference to the terms of payment of the premium on that policy.

Q. Tell us as near as you can what she said, or the substance of what she said.

A. She said something like this, "Now, this is on the same terms as the first policy is not?" or something like that, and Mr. Porter said "yes." She wanted to have it exactly understood for the simple reason that they were going away.

Q. I do not know how you know what she wanted understood?

A. I heard her say so, I was right there. I was right at the spot at the time. He was standing at the door. Mrs. Waters went to the door, and I was standing there also, and Mrs. Waters said in substance, she wanted to know whether this policy was delivered on the same terms as the first one, and Mr. Porter said it was. Then she went on to state her reason why she wanted to know and be positive about the terms of the policy. I heard it, I was right there. I heard her express her intentions. I heard her give her reasons.

Q. Was there anything further said by either of them in relation to that insurance, at that time?

A. She said, "If Mr. Waters don't pay this by the first of September it is understood that you
82 will take his note for three or four months, the same terms as the first one," and Mr. Porter said that that was the agreement, that was the understanding.

Q. Was there anything further said?

A. Very little, if anything, because Mr. Waters was busy that morning.

Q. How long did Mr. Porter stop there?

A. The entire time did not consume over five minutes, seven minutes probably. Just as quick as I could call Mrs. Waters, and she come to the front door, that was the time.

Q. Was it in general terms spoken of as being on the same conditions as the first policy or were those conditions named?

A. The conditions were named.

Q. Do you know of any reason why your recollection should be better as to what that conversasation was, to-day, than it was a year and a half ago?

(Objected to.)

Q. Are you absolutely certain that it was the 30th day of August that you went to Mr. Porter's house in the evening?

A. Yes, sir.

Q. No question about that?

A. No, sir.

Q. And it was on the following day which would be the 31st, that you went to the office?

A. Yes, sir.

Q. What time in the day did you go to the office?

A. About one o'clock.

Q. What was your object in going to the office?

A. I went there under directions.

Q. That is not the question. What did you go there for?

A. Simply to make a tender of that money.

Q. What did you say when you went in?

A. I simply came to make a tender of the money.

Q. Just use the language that you used at that time?

A. I cannot say that I can use the language that you have on those notes at all. I wont attempt to do it.

Q. I have not asked you anything about any notes, I merely ask you to state the substance

83 of what you said when you went into the office on that day?

A. I came there to make a tender of the amount of $358.65.

Q. Is that all you said?

A. It was not all that I said. I do not remember exactly every word that I said.

Q. I do not ask you for every word you said, was that the substance of what you said?

A. That is as near the substance as I can remember.

Q. Do you recollect anything else you said?

A. There was not much else said Mr. Winship. When that was said that was about all that was to be said.

Q. How came you to go there at that time?

A. I went there under direction or by request of Mrs. Waters.

Q. Had you not already made a tender of that money to Mr. Porter?

A. Yes, sir.

Q. Had he accepted it?

A. Yes sir, he had accepted the tender.

Q. Then what was your object in going there?

A. I said that I simply went there by request of Mrs. Waters. I was as an agent, really, in the matter. It was not any of my private business at all.

Q. When you went into the office did you introduce yourself?

A. I do not remember whether I did or not.

Q. Were you acquainted with any of the persons that were there present?

A. No, sir, not personally.

Q. Do you know how that office was occupied and what for?

A. I believe it was occupied as a life insurance office, by Mr. Porter, and, presumably by you, I did not know you at that time,

Q. Do you know about any other business that was carried on there—ticket agency— or anything of that kind?

A. I did not pay any attention to that, I do not know whether there was any ticket agency there, because I did not stop to inquire.

Q. When you went in there you did not tell any one who you were?

84 A. It is possible that I might have introduced myself.

Q. But did you do it?

Q. (By the Court.) Tell us who was in there, and what you said, and how you introduced yourself.

A. I think Mrs. Winship was there.

Q. (By Mr. Winship.) Did you tell Mrs. Winship, or anyone else, who you were?

A. No. I would not swear that I told Mrs. Winship who I was. My recollection is that I told Mrs. Winship what I came there for, to make a tender of that money. I did not know that it was necessary for me to tell who I was.

Q. My whole object is to find out the language that you used as near as you can give it, or the substance.

A. I do not remember my language. I did not make a note of my language at all.

Q. The substance of it?

A. The substance of it was that I came there under the direction of Mrs. Waters to make a tender of that money, $358 65.

Q. Did you not say then and there that you wanted to tender the money to Mr. Porter?

A. I do not remember whether I did or not. I might have said that I came there to make the tender to Mr. Porter's office, and I might not have said it.

Q. Did not Mrs. Winship say to you then and there that Mr. Winship was away, and advised you to let it lay until he returned?

A. I wont swear that she did.

Q. Did you say that you would not have anything to do with the Company or with Mr. Winship that your business was with Mr. Porter?

A. I do not remember saying any such thing.

Q. Did you say it?

A. I would not say that I did. or would not say that I did not.

Q. What directions did Mrs. Waters give you?

A. She simply wanted me to go there to make a tender of the money.

Q. What did she tell you to do?

A. She asked me if I would not go there, and I went.

Q. Go there for what?

A. Got there and make a tender of the money.

85 Q. That was all said?

A. It is not very likely that that was all she said. I cannot remember everything that she said, nor can I remember everything that Mrs. Winship said, or anybody else. Those are the facts as near as I can remember. There was no great conversation connected with the tender of it.

Q. When did she give you those directions?

A. It was either that evening, Monday evening, or Tuesday morning after she came down town, I do not remember which.

Q. Where were you when she gave you those directions?

A. I was either at her house or at Mr. Rouse's office.

Q. Can you swear which?

A. I cannot swear which.

Q. Did you bring the money down town with you when you came down that morning?

A. I think I did.

Q. Did you have the money in your possession from the time you took it to Mr. Porter's house, until you went to make that tender?

A. I wont be positive whether I had it, or Mrs. Waters had it.

Q. Did you count it?

A. Yes, sir, I counted it.

Q. When?

A. I counted it before I went over to Mr. Porter's house.

Q. When you left Mr. Porter's house where did you go that night?

A. I went back to Mrs. Waters.

Q. Did you report to Mrs. Waters what you had done at Mr. Porter's house?

A. I did.

Q. What did she then say to you?

A. Well, now, that I cannot say positive.

Q. As near as you can the substance of it?

A. She said a great deal that evening, I cannot begin to remember all she said.

Q. Well, what did she say in relation to this tender, that is what I want to get at?.

A. Probably she was satisfied with the success of the tender.

Q. You say you went to Mr. Porter's office under instructions. We would like to know what those instructions were.

A. They were simply in effect to make a tender of the money.

86 Q. A tender of the money to whom?

A. Tender of money to Mr. Porter's office in payment of the premium on those policies.

Q. You came back from Mr. Porter's house and reported to her what you had done?.

A. Yes sir.

Q. What did she say about doing anything further, if anything?

A. She thought of making a tender; whether it entered into her head that evening or the next morning, or whether it was somebody else that spoke of it, or whether she decided upon it after she went down town the next morning and consulted Mr. Rouse, I do not know. I think probably she consulted with Mr. Rouse before she decided on that course, and it was decided a proper thing to do.

Q. You have told us what you do not know about it, now tell us what you do know. When did she give you the first directions to go to Mr. Porter's office.

A. I think probably it was in Mr. Rouse's office after she had decided upon it.

Q. (By Mr. Hoyt.) What date was that, do you recollect was it Monday?

A. This was on Tuesday, I believe, following.

Q. (By Mr. Winship.) Now, at Mr. Rouse's office, what did she say to you about going over to Porter's office? Give the language as near as you can?

A. She asked me to go over.

Q. What did she say?

A. Asked me to go over and make a tender of the money to Mr. Porter's office.

Q. Gave you no further instructions about it in any way?

A. I do not remember any specific instructions.

Q. Any general ones?

A. Nor any general ones in particular.

Q. Did you talk it over as to what you should do?

A. Her and Mr. Rouse talked the matter over.

Q. In your presence?

A. I do not remember whether I heard the conversation or not.

Q. If you did not hear any conversation, how do you know they talked it over?

A. Well Mrs. Waters went there for that purpose.

87 Q. How do you know?,

A. Because I went along with her, I wont say that I sat right by her side when she was talking to Mr. Rouse, I think I was in the office and I will swear that I was in the office.

Q. She went there for that purpose because you went along with her?

A. Not because I went along with her. She went of her own accord and I went with her.

Q. How do you know what her purpose was in going there?

A. Because she spoke of it in the morning.

Q. You say you knew she was going there for that purpose because she spoke of it in the morning?

A. Yes, sir, to consult with Mr. Rouse on that point.

Q. On what point?

A. About making a tender.

Q. Is that all she said, "I am going there to discuss about making a tender?"

A. She did not go there to discuss it, she went there to consult about it.

Q. Did you tell her that you had made a tender

the night before and that Mr. Porter had accepted it?

A. Yes, sir, I think I told her the evening before.

Q. Then what led to this statement of hers that she was going down to consult Mr. Rouse in relation to this tender? What was the talk between you and Mrs. Waters that morning?

A. Oh, between Mrs. Waters and myself?

Q. Yes, sir.

A. My dear sir, you never asked me any question about that, I never understood it so.

Q. Let us go back then. Between whom was the conversation that you say she had in the morning which led you to know that she was going down to Mr. Rouse's office?

A. It was in the family there. Her daughters and her son, and her sister was there. Mrs. Hatch was present, and there was some of her other relatives, I not remember.

A. Were you there?

A. I was there in and around.

88 Q. Was the remark made to you that she was going down to see Mr. Rouse?

A. Not in particular.

Q. Tell us what she said in your hearing that morning about going to make another tender?

A. Mrs. Waters talked the matter over I believe with her sister.

Q. That you heard?

A. And there was some other people there that she thought she would go down and consult with

Mr. Rouse, and see about the propriety of making a tender at Mr. Porter's office.

Q. You remember no other conversation or remarks made by her in your presence or hearing about it?

A. That is the sum and substance of it.

Q. You came down with her to Mr. Rouse's office?

A. Yes, sir.

Q. You did not hear any conversation between her and Mr. Rouse?

A. I believe I did hear some conversation.

Q. What was it?

A. There was some conversation regarding the propriety of making this tender.

Q. What was that conversation?

A. In regard to the advisability of making it. Mr. Rouse thought it would be a good idea.

Q. Not what he thought, what did he say?

A. He said it would be a good idea to make the tender to Mr. Porter's office.

Q. Did he say that before Mrs. Waters said anything to him?

A. That I could not say whether he said that before anything was said at all, I do not think he did. Mrs. Waters commenced the conversation I think.

Q. What did she say?

A. She commenced right point blank; right on the point exactly, as to the propriety of making this tender at Porter's office.

Q. Did she tell him of the tender the night before?

A. Yes sir.

Q. And that Mr. Porter accepted the tender?

A. Yes, sir.

Q. Any reason given by Mrs. Waters as to why a new tender should be made?

A. Mrs. Waters did not give any reason particularly, Mr. Rouse thought it would be a good
89 idea to make a tender at his office.

Q. Did he give any reason?

A. Why he did not think it was necessary. Mr. Rouse did not, but he thought it would not do any harm to make it. He thought, as an insurance man it would not be necessary.

Q. You do not know what he thought. What did he say?

A. I know what he thought about that time, I think I have some recollection of what he thought about it.

Q. Please give us the process by which you can tell what a man thinks.

A. Well he expressed it in words, that is the way he thought.

Q. What did he say?

A. He said it would be a good idea to make it.

Q. Did he say it was not necessary?

A. He said it was not necessary to make the tender because the other was sufficient, but it would not do any harm to make the tender at his office.

Q. And so she asked you to go. Did you go directly from there to the office?

A. Yes, sir.

Q. Where did you find Mr. Hower?

A. Excuse me, I did not go directly from there to the office, I did not go there until noon, I found Mr. Hower at Hower & Higbee's store, I did not go for the reason that Mr. Hower could not get away any time only at noon.

Q. Did Mr. Hower say anything to you when he went into the office with you at that time?

A. No, sir, I do not think he said anything, If anything at all, it was very little.

Q. Or talked in relation to the tender you made?

A. It is possible Mr. Hower said something, I won't swear that he did or did not.

Q. Did Mr. Rouse go with you?

A. No, sir.

Q. Either time, at the house or office?

A. No.

RE-DIRECT EXAMINATION BY MR. HOYT.

Q. You have said two or three times on your cross-examination that Mr. Porter accepted the tender. What do you mean by "accepted the tender?" Do you mean that he took the money?

90

A. No, sir, I do not mean any such thing. He acknowledged the tender, I mean, I should have said he acknowledged the tender. He acknowledged the tender but did not accept the money.

Q. State whether or not he accepted the money, or declined to receive it that night when you went there?

A. He declined to receive the money.

Q. What is your recollection as to whether or not you made a tender on the Monday following Mr. Water's death. Are you certain whether you did, or did not make a tender?

A. Why, I made a tender.

Q. I mean at Mr. Porter's office?

A. I made it the day after I made the tender at his house.

Q. But are you certain as to whether or not you went there the day before?

A. To Mr. Porter's office?

Q. Yes, sir.

A. No, sir, I do not think I went to his office It is possible that I did, but I think Mr. Rouse went over to his office two or three times in the morning.

Q. (By Mr. Wilcox.) Were you present when Mr. Rouse went over to Porter's office?

A. I think I was in Mr. Rouse's office.

Q. Well, you do not know whether he went over or not unless you were with him?

A. Simply what he said, that he had been over there.

Q. (By Mr. Hoyt.) How was it as to going there Monday. Do you mean to state positively that you did not go there Monday?

A. No, I won't state positively that I did not go there Monday. I do not recollect particularly.

Q. But you know you went there Tuesday?

A. Yes, sir.

Adjourned until next morning at 9 o'clock, May 7th, 1884, 9 A. M.

DEPOSITION OF H. C. ROUSE.

Henry C. Rouse, called by plaintiff, being first duly sworn, testified as follows:

91 Q. You reside in Cleveland?

A. I do, yes.

Q. Are you acquainted with Mr. Porter?

A. I have met him.

Q. State whether you remember the event of Mr. Waters' death.

A. Distinctly, sir.

Q. State whether you saw Mrs Waters soon after?

A. The following morning, yes sir.

Q. Where did you see her?

A. At her residence, I think it was Thursday, I am not confident however.

Q. What, if anything, did you have to do with any insurance policies when you went there the next morning?

A. They were put in my charge.

Q. Were there any insurance policies in the Union Mutual of Maine, put in your possession?

A. There were two,

Q. Who gave them to you?

A. Mrs. Waters.

Q. What did you do after you left the house?

A. I took the policies and went down to the city.

Q. Where did you go in the city?

A. I visited first the office of General Elwell, on Euclid avenue.

Q. What were your relations with Mr. Waters?

A. Mr. Waters and I were associated in business.

Q. Who was in General Elwell's office when you came in?

A. There were several men there besides General Elwell, and among others a man who I afterwards learned was Mr. Porter, the manager of the Union Mutual Company.

Last part of answer objected to.

Q. Do you know why Mr. Porter was there?

A. I do not.

Q. State what occurred there in Mr. Porter's presence in relation to these insurance policies.

A. I stated the death of Mr. Waters, which created great surprise among the men who were there, including Mr. Porter, who made an exclamation.

Q. What was that exclamation?

A. He said "My God!" He was very much surprised.

(Testimony as to conversation objected to.)

92 Q. Did you say anything to Mr. Porter in reference to these insurance policies?

A. I did. I stated that I had two policies in his Company and I would make the tender there—make the claim.

Q. What did he say?

A. I do not recollect what his reply was, if any.

Q. Now, come down to a later time when a tender was made. What, if anything, did you do

about making a tender to the agent of this Insurance Company.

A. I procured legal tender in money to the sum of $358.65.

Q. Do you remember what day it was?

A. I think it was Monday, I am not sure.

Q. Where did you get the money?

A. At the Commercial Bank I believe.

Q. State whether or not you got the exact amount of money?

A. I know that I did, I have a distinct recollection on that point.

Q. And what kind of money was it?

A. In legal tender.

Q. What did you do after you had gotten the money?

A. I went to the office of Mr. Porter with this money and a witness to make a tender of it. I did not find Mr. Porter, he was not there, I made strenuous efforts to find him and failed.

Last part of answer objected to.

Q. Then what did you do with the money?

A. I gave it either to Mrs. Waters or Mr. McKnight.

Q. Where were they—in Porter's office?

A. Yes, with me.

(Proof of death shown witness.) I will ask you if you ever saw that paper before?

A. Yes, sir.

Q. Who made out that proof of death?

A. Mrs. Waters executed it. This is partially in my handwriting, and partly in the handwriting

of the Notary, probably, Foster I think.

Q. What did you do with that proof of death after it was made out, if anything?

A. It was forwarded to the chief office of the Company.

Q. (Paper shown witness.) State whether you received that letter in reply.

A. I did.

93 Plaintiff offered in evidence proof of death, and letter from DeWitt, President of defendant Company.

CROSS-EXAMINATION BY MR. WILCOX.

Q. You say you are in the Insurance business?

A. Yes.

Q. And were at the time of the death of Mr. Waters?

A. Yes.

Q. And that Mr. Waters was engaged in business with you at that time?

A. Yes, sir.

Q. How long prior to his death was he so associated with you in business?

A. For several years, probably seven years, six or seven years.

Q. And up to the time of his death?

A. Yes.

Q. I will ask you if just prior to his death he attended to his business?

A. He did, yes.

Q. Right along?

A. Yes sir.

Q. Had not been absent from the city?

A. His business kept him away nearly all the while, sir, he was absent from the city almost con. stantly.

Q. Prior to his death when did you last see him?

A. The night he died.

Q. Prior to that time when did you see him?

A. I think about two weeks before.

Q. Where?

A. I think it was at my office.

Q. He was at Chautauqua just prior to his death was he not?

A. He was.

Q. For how long a period?

A. I would say for three weeks. I saw him after his return to Cleveland.

Q. Do you know the purpose of his going to Chautauqua?

A. I do no not. My presumption is it was for pleasure, I only know it was an outing—not on business.

Q. Where did you state in your direct examination that you got the money?

A. At the Commercial National Bank of Cleveland.

94 Q. Are you positive about that?

A. Yes. No I am not. I will not state that positively.

Q. Why not?

A. I cannot remember distinctly. But I will swear that the money was in legal tender.

Q. Why do you say that you got it at the Commercial National Bank if you are not positive?

A. Because I keep my accounts there.

Q. Was that the only reason you stated so in your direct examination?

A. That was a strong reason for so saying.

Q. Your personal account?

A. My personal account, yes sir.

Q. Did you draw this money from your personal account?

A. I do not remember from what account I drew it from.

Q. Had you the privilege of drawing upon any other account except your personal account?

A. Yes, sir, I have several; had at that time.

Q. Tell us according to your best recollection where and from what account you got the money?

A. My impression is that I took a check to this bank and drew out the money against the check.

Q. Whose check?

A. I think it was my own check.

Q. If that be true, that it was your personal check, it came from your personal account, did it not?

A. Probably.

Q. Have you had any conversation with the parties to this case since you testified before?

A. I think not in this respect.

Q. Are you positive?

A. No.

Q. Would you remember it if you had had any

conversation about this matter since you testified before?

A. Yes, very likely I might.

Q. Would you?

A. I remember having had conversation about it after the last trial.

Q. Did those conversations in any way change your memory in regard to the transaction?

A. No sir.

Q. You remember testifying in this case at
95 the former trial, do you not?

A. Yes.

Q. Do you remember what you testified to in this regard?

A. I do not, I have not refreshed my memory on it.

Q. Is it not true that in answer to that question on the former trial you testified that you got the money from Crumb and Baslington?

A. It may be, sir.

Q. Is it true?

A. That I cannot tell.

Q. Have you no recollection as to what you testified to in that respect?

A. I have not. It might have been at Crumb and Baslington's, it might have been at the Commercial Bank.

Q. Was not your recollection as good upon the former trial, as good as it is now in regard to the transaction?

A. It was better probably, very much, undoubtedly, in respect to these details. I have not dwelt upon them since.

Q. Did you not testify upon the former trial that the money was Mrs. Waters' money?

A. I presume so, yes, sir.

Q. Then why do you now testify that it was not her money?

A. It was her money, sir. I was the agent in procuring the money.

Q. What day was it that you got this money?

A. My impression is that it was the following Monday after Mr. Waters death. That is my recollection of it.

Q. Did you have any conversation with Mrs. Waters just prior to your procuring the money?

A. Yes.

Q. Where?

A. In my office probably.

Q. Do you remember that it was in your office?

A. I think it was, yes.

Q. Anybody present besides you and Mrs. Waters?

A. I think Mr. McKnight was there.

Q. And heard the conversation?

A. Whether he did or not I do not know.

Q. He was near enough to hear, was he?

A. I should think so.

Q. Was there any talk at the time about making a tender?

A. Yes.

Q. Was anything said by Mrs. Waters or
96 yourself as to the necessity of making a tender.

A. I do not know in that respect, do not remember.

Q. Was there any conversation upon that subject?

A. There was talk about the tender, yes.

Q. Let us have what talk there was upon that subject.

A. It was thought best to make a tender.

Q. What was said?

A. The conversation all tended to that—that a tender should be made.

Q. Tell us what was said if you can?

A. I cannot verbally recall the conversation.

Q. The substance of what was said?

A. I do not know that I can particularize further than that.

Q. Did she say that she thought a tender ought to be made?

A. I think she did.

Q. That is your best recollection is it?

A. Yes.

Q. And what reply, if any, did you make?

A. I agreed with her.

Q. Was there anything said about the reason why it should be made?

A. I do not remember what the detail of the conversation was. I cannot remember those details at this time.

Q. Did she at that time tell you of any arrange-

ment that she claimed to exist between Mr. Porter and Mr. Waters?

A. Yes, mention was made of that.

Q. Did she state what the arrangement was?

A. I think she did.

Q. When did you get those particulars?

A. The morning after the death of Mr. Waters.

Q. How early in the morning?

A. I think it was about half-past eight o'clock; eight or half-past.

Q. Where do you live in respect to Mrs. Waters?

A. I live about a mile and a half from her residence.

Q. How did you happen to be at Mrs. Waters' house so early in the morning?

A. I received word of Mr. Waters's death.

Q. From whom?

A. From Mrs. Waters early that morning.

Q. By note?

A. By note or word; I do not remember
97 which; I think it was by messenger.

Q. Did she request you to come to her home?

A. That I do not remember.

Q. You do not remember the contents of that message?

A. I do not remember exactly what the message was.

Q. But you went in response to it?

A. I went immediately, as soon as I was able.

Q. How long did you stay there?

A. Fifteen or twenty minutes, perhaps.

Q. Did you have any extended conversation with Mrs. Waters?

A. As much as that time would allow—a quarter of an hour or ten minutes.

Q. Talked with her all the time you were there, did you?

A. Nearly all, sir.

Q. What was the subject of your conversation?

A. That that is used on such occasions—condolence.

Q. Was it in regard to these policies?

A. Upon leaving I asked her to give me these policies.

Q. What did you know about the policies?

A. Mr. Waters had requested me to attend to that business for him.

Q. Attend to the insurance business?

A. Yes, and his other business.

Q. When?

A. Previous to his death.

Q. How long previous?

A. The day before.

Q. What time on the day before?

A. About eight o'clock in the evening.

Q. That was the last time you saw him before his death?

A. It was. Yes.

Q. (By Mr. Hoyt.) He died that same night?

A. Yes.

Q. You mean it was about four hours before he died?

A. Yes.

Q. (By Mr. Wilcox.) Was he conscious of approaching death at that time?

A. I think he was, undoubtedly.

Q. He spoke of it, did he?

A. He did. I think he did. I think he was conscious of approaching dissolution.

Q. Did he say anything to you about the policies in particular?

A. He did not. I did not know what policies he had until I received them in the morning.

Q. Did he say anything about the necessity of making a tender of the money?

98

A. He did not. No.

Q. Did not give you any information in regard to it?

A. None whatever.

Q. And upon your request Mrs. Waters gave you these policies?

A. Yes.

Q. This conversation that took place at your office was on Monday following?

A. I think it was.

Q. Did you go and make a tender on Monday, or attempt to make it?

A. Yes, I was one of the party.

Q. Where did you go?

A. To Mr. Porter's office.

Q. Who were the other parties?

A. I think Mrs. Waters and Mr. McKnight.

Q. Did you all three go to the office?

A. It is my impression we did. I cannot swear to that, though.

Q. Why not?

A. Because we made several visits there, and my recollection is not clear upon that special first visit.

Q. All three of you made several visits, did you?

A. Made several visits, yes.

Q. Did you go to the office each visit?

A. I did not. I made one or two, perhaps three, visits.

Q. Upon this occasion you went along at any rate?

A. I went along, yes, when the money was first taken over there.

Q. On Monday?

A. Yes.

Q. And Mr. McKnight was along?

A. I think he was, yes.

Q. And upon this occasion did you go into the office to Mr. McKnight?

A. It is my impression we did.

Q. Did you have the money, or did he?

A. That I am not positive about.

Q. Don't remember?

A. No, I do not.

Q. Well, you went to get the money?

A. I did.

Q. Did you keep it, or did you deliver it to——

A. I either kept it myself or delivered it to Mr. McKnight.

Q. My question is which was it?

A. I cannot tell you.

Q. Can't you tell?

A. No, not positively.

Q. When you went to the office?

A. Inquiry was made for Mr. Porter.

99 Q. Of whom?

A. Of the person in charge there.

Q. Who was in charge?

A. Some clerk, I take it.

Q. A lady or a gentleman?

A. I think it was a lady. I met there two parties at different times, one was a lady and the other was a man; the woman was there more often, I think.

Q. Do you know the parties?

A. I do not know.

Q. Do you know now? Have you since learned who they were?

A. I don't, I do not know.

Q. You inquired for Mr. Porter?

A. Yes, sir.

Q. Did you make the inquiry?

A. I think I did.

Q. What response did you get to that?

A. I was told that he was not in.

Q. What next was said?

A. Wanted to know when he would be in; where we could find him.

Q. What response?

A. Didn't seem to know We got no satisfactory information as to his whereabouts, although we tried there and outside, too.

Q. I did not ask you for that. What occurred right there in the office? Go ahead and give all

that occurred there in your own way.

A. That is all I recollect.

Q. And you went away then, did you?

A. We did; yes.

Q. Did Mr. McKnight go with you?

A. I think he did.

Q. Are you sure about it?

A. I don't know; I cannot say about that; I think he went away with me.

Q. Was there any tender made there?

A. At that time—that first visit?

Q. Yes.

A. I don't think there was. No, nobody to tender it to.

Q. If you had the money you took it away with you, did you not?

A. I don't know whether I took it away, or whether McKnight took it away.

Q. If you had the money, you took it away with you?

A. Well, not necessarily so; but if I had the money on my person when I left the office, I did, but whether I did or not I don't know.

Q. And if Mr. McKnight had the money he took it away with him?

A. If he had the money he took it away, yes.

Q. At any rate the money was taken away?

A. My impression is that it was on that occasion.

(Mr. Hoyt, we will admit that it was, because it was tendered.)

A. The money was left there at one time, but it

was not on the occasion of this first visit, if that is the one you are referring to.

Q. I did not ask you for that, did I? You say the money was left there. How do you know it was?

A. It was left there by my direction.

Q. How do you know?

A. Why, because we discussed that matter beforehand.

Q. Were you there when it was left there?

A. I think not.

Q. Then you don't know, do you?

A. I do not positively.

Q. Then why do you testify to it?

A. Why, that is what I thought you were trying to bring out in questioning me, that is all.

Q. I am trying to get at your knowledge, not somebody else's knowledge, or what somebody told you. After you left there on this Monday what did you next do, where did you go, and what did you do?

A. I went to my place of business.

Q. And Mr. McKnight went with you?

A. Perhaps he did, sir.

Q. Well, did he?

A. I think so.

Q. Was Mrs. Waters there?

A. Whether she was or not at that moment I do not recall.

Q. You have no recollection whether she remained to your office during this visit across the street or not?

A. I don't remember in that respect, no.

Q. Did you have any conversation with Mr. McKnight or Mrs. Waters immediately after your return?

A. Oh, yes, I presume we did.

Q. Well, did you—do you remember it? What was the conversation?

A. We determined upon a course of procedure.

Q. I ask you what was said in that conversation, not what you determined upon.

A. Oh, I can't remember the verbiage, sir, I don't remember in that respect.

Q. Well, can you give the substance of what was said?

A. Why, simply an exchange of ideas on
101 the situation, and the surprising absence of Mr. Porter from his place of business and our inability to find him anywhere. That was the gist of the conversation.

Q. That was the only attempt that was made at that time?

A. We made several attempts during that day, as I remember it.

Q. At that time that was the only attempt you had made, when you went to his office and did not find him in?

A. You are referring now to that afternoon, are you not?

Q. Monday afternoon, yes.

A. Well, several visits were made. I missed one, I am sure.

Q. Do you know anything about any visits that

were made except when you were present?

A. Oh, no, I am not certain of that, certainly not.

Q. Then you are now able to state that Mrs. Waters was at your office on your return?

A. My impression is she was, or came in soon after. Yes, I saw her again that afternoon.

Q. Anything said about going to Porter's house?

A. Yes.

Q. Did you go?

A. I did not, no.

Q. When did you next see Mrs. Waters and Mr. McKnight?

A. I think it was the following day.

Q. At your office?

A. Yes, probably it was.

Q. Had you a conversation with them about this tender?

A. Yes.

Q. What was it?

A. Well, Mr. McKnight related to me his experience with respect to the tender of the money; I distinctly recall that.

Q. Well, give us that experience.

A. Well, he waited around the house of Mr. Porter, and when Mr. Porter had retired for the night knocked somebody up. and had a witness there, and made a tender of the money.

Q. Mr. McKnight told you and Mrs. Waters at your office that he had made a tender to Mr. Porter the night before?

A. I think it was at that time, yes.

102 Q. What did you do then, or what did they do in your presence?

A. I do not recollect anything further on that occasion.

Q. Any talk about making another tender?

A. I do not remember it; do not remember that there was; there might have been.

Q. If anything had been said or done there, would you remember it?

A. Perhaps I shouid; very likely I should, yes.

Q. Did you know of another tender having been made or attempted?

A. I believe there was a tender made subsequently.

Q. Do you know anything about it?

A. I do not from absolute knowledge, because was not there.

Q. Was it made in pursuance of any conversation that you had with Mrs. Waters?

A. I do not recall that it was.

Q. How soon after it was made did you know of it?

A. Well, very soon, I presume.

Q. Immediately after?

A. That I cannot say, because I was not there; I was not with Mr. McKnight.

Q. Did they return to your office and have any conversation in regard to it immediately after it was made?

A. They may have done so.

Q. If so, what was said?

A. My recollection is that the money was left in Mr. Porter's office with the person in charge there, whoever it was. That was the report I got. That is all I know about it.

Q. What I want to get at directly is this: Was there anything said to you, or in your presence, and in the presence of Mrs. Waters, by her or by Mr. McKnight, as to the necessity of making the second tender—or a second tender?

A. No, I do not recall that there was.

Q. You do not know why that was made, then, nor why it was attempted?

A. No, I do not.

Q. Did you ever see the money after that?

A. I do not remember what disposition was made of it, sir.

Q. Don't you remember anything about it at all?

103 A. I do not at this time recall, no.

Q. Did you have any conversation with Mrs. Waters about what was done with it?

A. I presume I may have had.

Q. If you did, do you remember it?

A. I do not.

Q. Did you see these proofs of death signed?

A. Yes, sir.

Q. All of them?

A. Do you refer to this company's proofs only?

Q. This proof here that you have been testifying about.

A. Yes, I saw that. That is my signature.

Q. Did you see Dr. B. T. Brown sign this?

A. I do not know whether I did or not.

Q. You went along with the notary, did you not, when these were made out?

A. I may have done so, I probably did. I cannot swear to that.

Q. You had charge of the getting up of these proofs?

A. I had, yes.

Q. Then you probably saw that, did you?

A. I probably did, still I do not know positively.

Q. Are you able to state whether that is his signature or not?

A. No, I am not, because I am not familiar with it, and I would not know it to state whether it was or not.

Q. And you do not know now whether you saw him sign it or not?

A. I do not. I am not a witness to that signature.

(Plaintiffs counsel admitted the signature of Dr. B. P. Brown referred to.)

RE-DIRECT EXAMINATION.

Q. In regard to this money—whose money was it?

A. Mrs. Waters' money.

Q. You say that your recollection is not certain whether you got it at the Commercial National Bank or at Crumb & Baslington's?

A. No, I only know this: That if it were in business hours, it would have been gotten at the

Commercial National Bank, and if it were after three o'clock it would have been gotten at Crumb & Baslington's. That is my custom. That is the idea upon which I predicate my testimony.

104 *RE-CROSS EXAMINATION.*

Q. Why is it that you can be positive in answer to Mr. Hoyt and cannot be positive in answer to me?

A. In what respect?

Q. Upon the same question. How is it that you can be positive in one instance and cannot be positive in the other?

A. Perhaps I do not understand your question, sir.

Q. Mr. Hoyt just asked you whose money that was, and you promptly said: "Mrs. Waters' money." When I asked you that question you could not tell. Now, will you give me a reason for that?

A. Probably I did not understand your question.

Q. (By Mr. Hoyt.) On your cross-examination you were asked as to whether or not Mrs. Waters said anything to you when she came down to your office that Monday as to there having been an arrangement between her husband and the agent in regard to the payment of insurance. State what she said in regard to what that arrangement was?

(Objected to by defendant. Objection sustained, to which defendant then and there excepted.)

DEPOSITION OF H. T. HOWER.

H. T. Hower called by the plaintiff, being duly sworn, testified as follows:

Q. (By Mr. Kerruish.) You have resided in Cleveland how long?

A. About 21 years.

Q. Were you acquainted with Mr. Waters in his life time?

A. Yes, sir.

Q. Do you know Mr. Porter?

A. Yes, sir.

Q. Do you recollect the fact of Mr. Waters's death?

A. Yes.

Q. State what, if anything, you had to do in connection with any policies of insurance immediately after his death?

A. I went with Mr. McKnight to pay a premium on a life insurance policy, or make a tender of the money to pay it.

Q. Where did you go?

A. Went to Mr. Porter's house on Bolton avenue.

Q. About what time of the day or night was it?

105 My recollection would be that it was about nine o'clock in the evening.

Q. What were the circumstances? Detail the whole transaction.

A. We called there at Mr. Porters and found the door open and knocked, and Mr. Porter came down. He had gone up stairs. I don't know but what he

had gone to bed, or was going to bed. He asked us in. We went into the parlor and we made known our business to him—that we wished to pay that money, or make a tender of it, and he said "Gentlemen I cannot take the money.

Q. You offered him the money?

A. We offered him the money, yes sir.

Q. How much?

A. $358.65, the amount of the premium due. He said, "I cannot take the money gentlemen, but I will accept the tender of it."

Q. What else occurred?

A. That was the main thing that we had to do. We had, of course, some other talk, and some preliminary talk, and talk afterwards, but I do not recollect anything specially in regard to that money.

Q. What personal knowledge have you of any previous or subsequent tender?

A. We made a tender of it the next day down at their office on Superior street, and left the money there.

Q. State the circumstances.

A. We went down about one o'clock, I should say it was, to Mr. Porters' and Mr. Winship's office, and offered them the money, and they would not take it. We left the money there.

Q. (By the Court.) Offered it to whom?

A. To those in charge of the office.

Q. You did not find Porter in the office?

A. I think Mr. Porter was not in, Mrs. Winship, I think, was the one.

Q. You offered it to whoever was there?

A. Yes, and they refused to accept it. We left the money there.

Q. Where did you leave it?

A. Left it on the desk of the person in charge. Told them we should leave the money there for them at any rate.

106 Q. (By Mr. Kerrnish.) Who was with you?

A. Mr. McKnight.

Q. Anybody else?

A. No. we two went alone.

Q. About how long did that interview in the office at that time last?

A. I should think probably two or three minutes.

Q. What amount of money was left?

A. $358.65, I think, was the exact amount.

Q. Have you any personal knowledge of the kind of money it was?

A. It was bills. I could not tell what banks the money were issued from.

Q. Do you know when the tender was made with reference to the time of Mr. Waters' death—how soon after?

A. It was Monday, the 29th of August, that we went to his house, and the next day, the 30th, to the office.

CROSS-EXAMINATION BY MR. WINSHIP.

Q. When did you first see Mr. McKnight at the time you say you went to Mr. Porter's house—what time of the day?

A. It was not day at all—it was after night.

Q. We will call it evening. What time in the evening?

A. It was a little before nine o'clock. We went there about nine. It probably might have been a half an hour, it might have been an hour before we went when he first spoke to me.

Q. Not what it might have been, but according to your best recollection what was it?

A. I could not say about that. It was within an hour.

Q. Where did you meet him?

A. I met him at Mr. Waters, when we started to go.

Q. You went to Mrs. Waters and found him there?

A. They notified me. Whether he came to ask me to go. or whether Mrs. Waters' son came I could not swear positively, but one of them asked me to go.

Q. How long did you remain at the house before you went over to Mr. Porter's house?

A. Not any time at all, did not sit down at all.

Q. Then you went directly to Mr. Porter's house?

A. Yes, sir.

107 Q. Did you ring the bell?

A. I could not say whether there was a bell there. If there was, I suppose we rang it. If

there was not we knocked. The door was ajar—partly open.

Q. Did you knock more than once, or ring the bell more than once, if there was one?

A. No, I think not.

Q. Mr. Porter came to the door?

A. Yes.

Q. Invited you in.

A. Yes.

Q. Who first spoke?

A. My impression is that Mr. Porter spoke when we went in.

Q. What did he say?

A. Asked us to walk in.

Q. I mean on this business that you went on, what was first said and who said it?

A. Mr. McKnight did the talking.

Q. What did he say?

A. He said he came to pay this $358.65.

Q. That was the language he used was it?

A. It might have been worded a trifle different, but that is my best impression about it.

Q. What did Mr. Porter say?

A. He said "Gentlemen, I cannot accept the money, but I will acknowledge the tender of the money.

Q. Did you have the money in your possession?

A. I did not.

Q. Did Mr. McKnight have it?

A. Yes.

Q. Where did he have it?

A. I should suppose he had it in his pocket.

Q. I do not ask you what you suppose. If you know, say so.

A. I could not tell, He had the money. He had it in his hand, I know that, but where else he had it I could not tell you.

Q. Did you have it in your hand?

A. I did not.

Q. Did you count it?

A. I did not.

Q. Then how do you know how much there was of it?

A. Mr. McKnight counted it.

Q. Then you are swearing to what somebody told you, are you?

A. Yes, with reference to the amount. I saw the money but I did not count it.

Q. Did you leave that money with Mr. McKnight or did you take it?

A. I did not have it at all.

Q. What time the next day did you see Mr. McKnight?

108 A. My best recollection would be that it was about noon.

Q. Did you ever count the money?

A. No, I never counted it.

Q. Did you ever see it counted?

A. Yes, I saw Mr. McKnight count it at Porter's. I saw him sit and turn the money over, and said he, "Here is $358.65."

Q. And at the time he said that he counted it, did he?

A. I could not tell whether he counted it, but

he turned the bills over. He did not count it out loud, mention the size of the bill, but he turned it over and said there was that much money there.

Q. Where did you see him the next day?

A. At the store.

Q. Where did you go with him from there?

A. To the office on Superior street.

Q. Whose office?

A. I could not tell you whether it was Winship's or Porter's, but there where they meet together on Superior street.

Q. Whom did you find there?

A. Found a colored man and a lady, that Mr. McKnight said was Mrs. Winship.

Q. Did you do any of the talking there?

A. I think not.

Q. What did Mr. McKnight say when he went in?

A. He wished to pay that money or make a tender of it.

Q. Just give his language as near as you can. Was that all he said—"I wish to pay that myney?"

A. "I wish to pay the money on the insurance policy."

Q. He said this to the lady?

A. Yes.

Q. What was said in reply?

A. She would not accept it.

Q. What did she say?

A. I could not tell you what she said. I could not tell you just the words she used, but she said she could not take it.

Q. Was anything said there in relation to Mr. Winships' being absent?

A. I could not tell you whether there was or not.

Q. Did she say to you or Mr. McKnight that you had better wait until Mr. Winship came home.

A. I could not say whether she did or not.

Q. Did Mr. McKnight say to her that he had
109 nothing to do with Mr. Winship or the Insurance Company, that his business was with Mr. Porter.

A. No, he did not say so.

Q. You swear positively to that?

A. I do.

Q. When were you next in that office?

A. Never, that I recollect of.

Q. Don't you remember of being there just before the last trial?

A. No, sir, I will say I was not there.

Q. Did you not go into the office to inquire as to who made the examination of Mr. Waters for this insurance?

A. I did not do anything of the kind at all; never have been in the office since. It did not make any difference to me about the examination.

Q. You are positive that you have stated the substance of all the conversation had in your presence at Mr. Porter's house; are you?

A. No, I did not say I did. I said those were the words that were used in trying to have him take the money, but preliminary remarks that might have been made about something else I could not state.

Q. I will change the question. You are positive that you have stated the substance of all the conversation relating to this question that was had at Mr. Porter's house?

A. Yes, all that.

Q. And also the substance of all the conversation relating to this question that was had at the office?

A. I have told you what I recollected of being stated at the office.

Q. And you have stated it all have you?

A. I would not say that I did, but I have told you what my recollection was about the matter—that we asked Mrs. Winship, or the lady there, to take the money, and she would not do it—she would not accept it.

Q. You asked her in the language you have stated?

A. I cannot tell just what language we used.

Q. I want you to tell as nearly as you can.

A. I did in the first start, as nearly as I could.

110 *DEPOSITION OF ALFRED ELWELL.*

Alfred Elwell, called by the plaintiff, being duly sworn, testified as follows:

Q. (By Mr. Hoyt.) State your age and occupation.

A. My age is 59; my occupation has been that of an attorney; I am rather retired.

Q. Where do you reside?

A. I reside in Willoughby, Lake County; my office in the city is at 25 Euclid avenue.

Q. How long have you been engaged in business in the city here?

A. Over twenty-five years.

Q. I will ask you if you have any recollection as to the death of Mr. Alfred Waters?

A. I have, sir.

Q. State whether or not, shortly subsequent to his death, you saw Mr. W. S. Porter?

A. I knew Porter very well, and used to see him almost daily.

Q. Have you any recollection of an interview that occurred at your office shortly after Mr. Waters' death, when Mr. Rouse and Mr. Porter were present?

A. I have.

Q. Do you remember what day that was with relation to Mr. Waters's death?

A. The next morning after Mr. Waters' death.

Q. About what time in the morning was it?

A. I get to my office at nine o'clock. Within an hour I should think; somewhere in the neighborhood of ten o'clock.

Q. Who was present in your office at that time?

A. Myself, my brother and Dr. Little officed there. I think we were all there. Whether any others were there at that time I am not positive.

Q. Was Mr. Pudney there?

A. I think he was.

Q. What, if anything, was said on that occasion by Mr. Porter to you in regard to insurance on Mr. Waters' life?

(Objected to as incompetent; objection overruled, to which defendant then and there duly excepted.)

A. Mr. Waters we were all intimately acquainted with. Mr. Rouse came into our office—that was the first that we knew that Mr. Waters was dead, and Mr. Porter happened to be in there. It was a general conversation; I would not want to
111 undertake to sort out what was said by Mr. Rouse to Mr. Porter, or Mr. Porter to Mr. Rouse.

Q. What was said by Mr. Porter to you in regard to the insurance?

A. Mr. Porter said to me—I think this was after Mr. Rouse went out—that Mr. Waters had recently taken $9,000 insurance in the company that he was agent for—some Maine company; Maine Mutual, perhaps; I don't know.

Q. What else was said?

A. That he had not paid his premium; that he had taken a note for his premium.

Q. What did he say, if anything, about having the note then?

A. He said he had the note, and that it had not been paid.

Q. State whether or not you saw the note?

A. I am not positive. My best recollection is that I did. The amount was talked about. I would not attempt to state the exact amount, but it was somewhere between $300 and $400.

Q. How did you happen to see the note?

A. He talked with me a little about it.

Q. Did he show you the note?

A. I am not positive with regard to that. My recollection is that he did.

Q. What further did he say in regard to this insurance?

A. There was considerable said. I cannot tell; I was attending to my business. There was a general talk there.

Q. Was the word "carrying" used by anybody?

A. I cannot remember.

Q. What, if anything, was said by Mr. Porter about his carrying insurance on Mr. Waters' life?

A. That there was an insurance of $9,000 in this Maine company; that the premium had not been paid, and that he had his note.

No cross-examination.

DEPOSITION OF J. H. ELWELL.

J. H. Elwell, called by the plaintiff, being duly sworn, testified as follows:

Q. (By Mr. Hoyt.) State your age, residence and occupation.

A. I am in my sixty-fourth year; I reside in the city; my occupation is that of a lawyer.

112 Q. How long have you lived here?

A. About thirty years.

Q. State whether you have a recollection of an interview occurring anywhere at which Mr. Porter was present?

A. I have a very distinct recollection of an interview after the death of Mr. Waters; I do not remember the date; it was the next morning after his death.

Q. Where did that interview occur?

A. In our office.

Q. What was said there, if you recollect, in the presence of Mr, Porter, or by Mr. Porter?

A. Mr. Porter was in our office, and Mr. Rouse came in, informing us of the death of Mr. Waters, and there was a general conversation, such as would naturally result from that announcement. After Mr. Rouse left, according to my recollection —it may have been while he was still present, I am not certain about that—Mr. Rouse had told us of the large amount of insurance that Mr. Waters was carrying, which surprised us, and whether it was while Mr. Rouse was present, or just after he left, I cannot say positively, but Porter remarked to us in continuation of this conversation, expressing our surprise at the amount of the insurance—he said that he was carrying, or that his company was carrying, some $9,000 or $10,000 insurance on Mr. Waters; $9,000 perhaps. He also said that Mr. Waters had not paid the premium, but he had his note for it.

Cross-examination by Mr. Wilcox.

Q. What amount of insurance was referred to in this conversation?

A. My recollection is that the amount was some $30,000 or $40,000. It surprised us, and we were expressing our surprise when Porter said that he alone was carrying some $9,000 of this, or his company. My recollection is that it was some $30,000 or $40,000 altogether. We were surprised that he was carrying so much.

113 *McKnight* being recalled for further cross-examination testified.

Q. (By Mr. Winship.) What was Mr. Waters' business?

A. Fire Insurance.

Q. How long had he been in that business?

A. That I could not say exactly. I think Mr. Waters had been in the fire insurance business commencing from 1860 to 1862—1862 up to the time of his death. I was not acquainted with him all the time that he was in the business.

Q. Did you testify at the former trial that you could not remember the words used by Mr. Porter as to the payment of this premium, but that if he was paid by the first of September cash, or after that by note, or something to that effect, it would be satisfactory? Was that your testimony?

A. I would not say whether it was positively or not, I have not got the notes before me, and I have not had them, I won't say, I don't remember, I have had other business on my mind, and I can't say what I testified to exactly, I know the facts.

Q. Did you testify at that time that you did not remember which policy it was that you were present when it was delivered?

A. I might have testified to it, and there was a reason for it.

Q. I am not asking you the reason. Did you testify so?

A. I don't know but what I might have testified to it; but that does not make any difference; I

know the facts, and I can testify to the facts. That is all I am here for.

Q. Were the facts as fresh in your mind a year ago as they are now?

A. No, sir, they were not. There is a reason for it, too.

Q. Did you testify at the last trial, in answer to the question, "How long before Mrs. Waters went away was it that this policy was delivered, if you remember, and this conversation had? Was it immediately before, or some weeks before?" Did you answer, "Well, it was a few days before; it was not a number of weeks, according to my recollection."

114 A. I don't understand that at all. Please put it so that I can understand it.

Q. Did you testify in substance, then, that this policy was delivered a few days before Mrs. Waters went away to Chautauqua?

A. Which policy?

Q. The only policy that you claim to know anything about the delivery of.

The Court: You gentlemen went all over this before.

The Witness: They asked me the same questions yesterday, your Honor.

Q. In answer to this question you may state which policy, to the best of your knowlsdge, was delivered at the time you were there," did you answer, "Well I think it must have been the four thousand dollar policy, it was the last one delivered?"

A. I might have testified to that.

Q. Did you testify to that?

A. I won't swear that I testified to it. It don't make any difference, I can swear to the truth right here now.

Q. Did you swear to a falsehood when you were on before?

A. I did not calculate to swear to any falsehood that time or this time either.

The Court. Answer whether you recollect what you swore before.

A. I don't recollect what I swore to before; I have not charged my memory with it the last two or three years. I have had other business.

Q. On the delivery of the second policy did Mr. Porter say to you or in your presence that that was the last policy?

A. I do not think Mr. Porter said it was the last policy.

Q. Did you so testify on the former trial?

A. I might have testified on the former trial, I won't swear that I did, or did not.

Q. Was your recollection as good on this question then as it is now?

A. What question?

Q. As to the conversation with Mr. Porter?

A. The conversation when he delivered the last policy?

Q. Yes sir.

A. My recollection is quite clear on that point now, if you please.

115 Q. Was it as clear on the former trial as it is now?

A. I cannot state to a hairs breadth, if you please, whether it was just as clear or not, but it is a fact, nevertheless. I am not here to testify to any falsehoods, or anything of that kind.

Q. Is there any reason why you can recollect Mr. Porter's conversation at the time of the delivery of that policy now, any better than you could a year ago last December?

A. There is no reason why I should not remember it just as well, if not better; not a particle, sir.

Q. Is there any reason that you can give us?

A. Yes, sir, I can give you a reason why I remember all the facts connected with this case better now than I did at the former trial.

Q. Is there any reason that you can give us why you can recollect Mr. Porter's conversation now any better than you could recollect that conversation a year ago last December?

A. Yes, sir, there is a reason. I cannot recollect any particular words, but the conversation—the sum and substance of it. The reason is this: That in the year 1881 I did double work all that year; I did Mr. Waters' work when he was at Chautauqua; he was State agent for two companies; I had my own company and his two besides. It put double work on me. Then, after Mr. Waters' death I continued that work, and after a while I was obliged to give it up on account of my health, and then along during the time of the last trial, in November, I think it was, I had private business of my own that was troubling me. Those are the reasons. Since then I have not had the labor on hands that I had

during that year; I have not had any one year of my business life as much labor; I have not performed as much labor in any one year of my business life as I did in the year 1881, and I can bring proof to that assertion.

Q. You testified when you were on the
116 stand before to the truth as you remembered it at that time, did you?

A. As near as I could recollect it at that time.

Re-direct examination by Mr. Hoyt.

Q. You listened to the testimony given at the last trial, did you not?

A. Yes, sir.

Q. State whether or not the hearing of the entire case refreshed your recollection in regard to it?

A. Yes, sir, it did.

Q. State whether or not you have not particularly since that time charged your mind with it in order to refresh your recollection?

A. I have at different times.

Q. You testified yesterday in regard to going and getting that money again. Do you remember?

A. I was not positive yesterday whether or not I had not gone back to the office to receive that money, but on reflection I don't know but what I did.

Q. If you went back there and got that money, was it in consequence of anything that had been received from the office?

A. A letter received from the office by Mrs. Waters in regard to the money—that it was there.

Q. The money was left there on Tuesday?

A. Yes, sir.

Q. What is your recollection as to whether or not subsequent to that time you went back to the office and got the money?

A. On reflection I don't know but what I did go back and get the money for Mrs. Waters. If I done so, it was at her request, and I left it with Mr. Rouse.

Q. Were you present when the tender was made at the office on Monday? Did you go there with Mr. Rouse?

A. No, I think not. I think I waited in Mr. Rouse's office.

Q. From whom did you get the money that you tendered at Mr. Porter's house that Monday night?

A. It was the same money that Mr. Rouse procured.

117 Re-cross examination.

Q. How do you know it was the same money Mr. Rouse procured?

A. He handed it to me, I believe.

Q. Did you swear positively before this jury yesterday in answer to a direct question that you did not go back into that office to get that money?

A. I did not swear positively, if I did—why—

Q. Did you swear in answer to the question, "Are you positive?"

A. Possibly I did.

Q. Yesterday when you were asked if you were not mistaken, and asked if you did not stop and

count that money on the stairs, did you swear that you did not go back after it?

A. I might have swore to that effect.

Q. What has quickened your recollection since that time on that question? Is your health better than it was yesterday?

A. I don't know but it is, yes.

Q. Did you count that money at all that you tendered?

A. Yes, sir, I did.

Q. When?

A. I counted it before I went to Mr. Porter's house.

Q. Did you swear on the last trial that you did not count it?

A. No, sir, I did not swear that I did not count it.

DEPOSITION OF H. H. LITTLE.

Dr. H. H. Little, called by the plaintiff, being sworn, testified as follows:

Q. (By Mr. Hoyt.) Where do you reside?

A. 1492 Euclid avenue.

Q. What is your age?

A. Sixty-seven.

Q. How long have you lived here?

A. About thirty years.

Q. Do you remember an interview that occurred at your office shortly after Mr. Waters' death at which Mr. Porter was present?

A. Yes, sir, I do.

Q. How soon after Mr. Waters' death did that occur?

A. I think it was the next day.

Q. What, if anything, was said in your hearing by Mr. Porter in relation to insurance?

118 A. Whilst Mr. Porter was in the office Mr. Rouse came in and announced the death of Mr. Waters. It was the first we had heard of it, and it created the usual sensation that such things do, and immediately after Rouse went out Mr. Porter observed that he had, or his company had, an insurance on his life of $9,000, for which he held Mr. Waters' note; that he had not paid the premium, but that he had his note for the amount.

No cross-examination.

Whereupon the plaintiff rested.

The plaintiff then closed, and the defendant introduced the following testimony, namely:

119 *DEPOSITION OF W. J. SHEPPARD.*

Dr. William J. Sheppard, being called and sworn, testified:

Q. (By Mr. Wilcox.) Where do you reside?

A. In this city; 72 Merchant avenue.

Q. How long have you lived in this city?

A. All my life.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been engaged in the practice of medicine and surgery?

A. Fourteen years.

Q. You may examine the paper that I hand you,

and state if you have seen it before? (Handing witness application.)

A. I have.

Q. You may state what connection you have had with that paper.

A. I filled out all these blanks in it with the exception of the first part.

Q. You may state when, and where and under what circumstances.

A. It was on the evening of the 10th of June, 1881, at Mr. Waters' house. It is the regular examination blank required to be filled out by the medical examiner in cases of life insurance by the Union Mutual Life Insurance Company, of Maine.

Q. Did you make the examination of Mr. Waters described on that blank?

A. I did.

Q. Who wrote the answers to the questions that appear here to be written?

A. In all questions to be asked by the examiner, I wrote them myself.

Q. In what Forms?

A. In Forms B. and C.

Q. I will ask you if Mr. Waters made the statements as there written down by you?

A. He did.

Q. Do you know Mr. Waters' signature? Did you see him sign that paper?

A. I saw him sign this paper; he signed it in my presence.

Q. And on what date did he sign it?

A. On the 10th day of June, 1881.

Q. I will ask you if you know whether Mr. Waters read that application or not?

A. He did. He read the first portion of it here (Form A.) before I asked him any questions, and then after I had filled out the portion of the blank which it was my duty to do, he read it all over before he signed it—or looked it all over carefully. I don't know that he read every question. I handed him the paper and he looked it over.

Q. How long did he occupy in examining it?

A. I could not say as to the exact time. Perhaps five minutes or so.

120 Q. Apparently examined it carefully?

A. I think he examined it carefully.

CROSS-EXAMINATION BY MR. HOYT.

Q. When was it this application was made out?

A. The portion that I filled out of it was on the evening of the 10th of June.

Q. What portion was not filled out on the evening of the 10th of June?

A. That portion known as Form A. I think was not; I do not remember when it was made out, because I had nothing to do with that, so that I could not say when it was filled out.

Q. Was it, Form A., filled out before you went there?

A. I cannot say as to that.

Q. How about Form B.?

A. B. and C. I filled out myself on that evening.

Q. It is in your handwriting, is it?

A. It is.

Q. It was the 10th of June, 1881, you say?

A. 1881.

Q. When this was done you were the medical examiner of the company, were you not?

A. I was.

Q. In the employ of the company?

A. Yes.

Q. Are you in the employ of the company now?

A. I am.

Q. Paid for your services, are you not?

A. Yes, sir.

Q. And when insurance policies are taken out, or application made, you appear on behalf of the company and make an examination for them, for which you get paid, do you not?

A. I do.

Q. Are you in the habit of making careful examinations?

A. I am.

Q. If there is any doubt about a risk you are not in the habit of returning it as good, are you?

A. No, sir; if there is any doubt about the risk I state the doubts.

Q. You did not state any doubt here, did you?

A. No, sir.

Q. What kind of an examination did you make of him?

A. What do you mean?

Q. I mean how careful an examination did you make of him?

A. I made as careful an examination as I always do, and I am always careful in those matters.

It is my instructions from the company to be careful, and I am.

Q. Then you discovered no reason why Mr. Waters was not a good risk, did you, on this careful examination?

A. I did not.

121 Q. He was a good risk, was he not, at the time you examined him?

A. I considered him so.

Q. Sound in every particular, was he not?

A. Yes, as far as I could ascertain.

Q. You testified so before, did you not?

A. I believe so.

Q. At the former trial of this case?

A. I do not remember whether those questions were asked or not. If they were, I testified to that effect.

Q. You testified that he was a good risk. Where was this examination made?

A. At Mr. Waters house.

Q. In what room?

A. Well, I don't know what room he called it. I suppose he called it his library.

Q. Was Mr. Porter there when the examination was made?

A. He went with me to the house, but during the examination he retired; I do not know whether he went home or not?

Q. Who was present in the room when the examination was made?

A. Mr. Waters and myself.

Q. Was Mrs. Waters there?

A. Not that I know of.

Q. You won't swear positively that she was not, will you?

A. I will swear positively that I did not see her.

Q. Did you not see her at all that evening when you were in there?

A. I saw her before the examination.

Q. Where did you see her?

A. In that room.

Q. Did she go out before the examination was completed?

A. She went out before it commenced.

Q. Did she come in during the time of the examination?

A. No sir, not that I am aware of.

Q. Will you swear positively that she did not?

A. I cannot swear to anything that I am not aware of.

Q. I want to know whether you are aware, or are not aware, of the fact whether she was there or not?

A. I told you that I was not aware of her being in the room.

Q. Then you swear positively that she was not, do you not?

A. Well, if you look at it so.

122 Q. Is not that the way you look at it?

A. Why certainly, if I don't know that she was not there, I don't know that she was not there.

Q. Then you know that she was not there don't you?

A. No, I don't she may have been in the room without my knowledge. I don't know but she may have come in behind my back.

Q. How large a room was that?

A. O, I don't know. I did not go there to examine the house, I went to examine Mr. Waters, and I took no notice of the size of the room. It was a fair sized room, though.

Q Well, during the progress of this examination if Mrs. Waters had come in there you would have known it, would you not?

A. Well, not necessarily so. A person could slip into a room noiselessly behind my back and I not know it.

Q. That is with felt slippers on?

A. Yes, or without.

Q. Suppose they were ordinarily clothed, not dressed as burglars are without the accessories that burglars usually have, while you were conducting that examination, if such a person so clothed, had come into the room, would you not have been apt to have known it?

A. No, not necessarily. I might have been so engaged in the examination as not to have noticed any little noise or anything of that kind.

DEPOSITION OF WARREN S. PORTER.

Warren S. Porter, being called and sworn testified:

Q. (By Mr. Wilcox.) Where do you reside?

A. At Cleveland.

Q. How long have you lived in Cleveland?

A. Twenty years.

Q. I will ask you to look at that paper and state if you have ever seen it before, and what connection you have had with it if any?

A. Yes I have seen it before.

Q. What connection have you had with it?

A. I wrote this application for insurance for Mr. Waters.

Q. What part of it did you write?

A. I wrote the application.

Q. What form—what part of the application? It is all an application?

A. Form A.

Q. Whose signature is that to Form A?

A. Mr. Waters.

Q. Did you see him sign it?

A. I don't remember whether I did or not.

123 Q. Is your name there as a witness to the signature?

A. Yes, sir.

Q. What is your best recollection?

A. My best recollection is that I did.

Q. That you saw him sign it?

A. That I did see him sign it.

Q. After Mr. Waters signed the application, or Form B. of the application, did you take the application?

A. Yes sir.

Q. What did you do with it?

A. I took it to the office to Mr. Winship.

Q. Took it to the office of the company.

A. Yes sir.

Q. In the city here?

A. Yes, sir.

Q. And you gave it to Mr. Winship?

A. I think I handed it into his hands.

Q. Was Mr. Winship in charge of the office at that time?

A. Yes sir. Well, no, he was not in charge of the office at that time, his headquarters were at that office.

Q. Why did you give it to him?

A. He sent it to the home office for me.

Q. I did not ask you that. Why did you give the application to Mr. Winship?

A. I gave it to him to have it completed, have the policy sent on here.

Q. When next did you see the application?

A. I do not think I saw it till the other suit.

Q. The former trial of this case?

A. The former trial, yes sir.

Q. I will ask you to loak at that document, and state if you ever saw it before and what connection you have had with it, if any?

(Handing witness paper.)

A. This is the policy that came for that application.

Q. How many policies came from this application, if you know?

(Objected to as incompetent; objection overruled.)

A. I wrote two for Mr. Waters. There was two policies issued.

Q. Is this one of them?

A. That is one of them.

(The Court.) Which is that?

(Mr. Wilcox.) This is the $5,000.

Q. And what was the other?

A. $4,000.

Q. Describe the $4,000 poliey?

A. It was the same as that, with the exception of reading for four thousand instead of five.

Q. As to the date, how was it?

A. It was a later date than that.

124 Q. What date, if you know?

A. Well, I think it was the latter part of June.

(Mr. Hoyt.) It was June 30th. There is no dispute about that.

Q. It was June 30th. There is no dispute about it. This is June 16th, and the other one was June 30th, $4,000?

A. Yes, sir.

Q. Like this except the date and amount?

A. Yes. sir.

Q. Where did you receive this $5,000 policy?

A. I received it at the office.

Q. And when, if you can tell?

A. I probably received it about the 20th of June.

Q. And what did you do with it?

A. I delivered it to Mr. Waters.

Q. Whereabouts?

A. At his house.

Q. Whereabouts in his house?

A. I think it was in the room that they term the

library. I won't be positive about that, however. It was in the front part of the house.

Q. And who was present?

A. Mr. Waters.

Q. Who else, if you know?

A. I don't know that anybody else was present at that time.

Q. What time in the day was it?

A. I think it was in the morning before I came down town.

Q. About what time in the day?

A. Well, perhaps nine o'clock.

The Court. When was it that you delivered it?

A. I delivered it at once, as soon as I received it. It would probably be about the 20th.

Q. (By Mr. Wilcox.) You cannot state the day definitely?

A. No, sir, I cannot state it positively.

Q. Do you know whether or not the policy had been in the office here any length of time before you received it?

A. I think not.

Q. Well, do you know anything about it?

A. No, sir. I think the policy was passed over to me on its arrival here.

Q. When, in respect to the time you got it, did you deliver it to Mr. Waters?

A. At once.

Q. Well, that means the same day or the next day?

A. Probably the next morning.

Q. And about what time was it in the morning?

125 A. About nine o'clock, I should think; it might have been earlier; it might have been eight o'clock. It was in the morning before I came down town to business.

Q. And to the best of your recollection, I think you said that nobody but Mr. Waters and yourself were present?

A. To the best of my recollection I think there was nobody else present.

Q. Where was Mr. Waters, and what was he doing?

A. Mr. Waters sat at his desk. As this room is here, the desk was situated here (indicating), writing; looking over his business papers, I suppose. I came up to the side of the desk and laid it on the desk, and I said to him that here was his policy.

Q. Give all the conversation, as near as you can recollect, that occurred at that time between you and Mr. Waters.

A. I said to Mr. Waters: "Now, if you will give me your note for 30 or 60 days it will be all right." He said: "No, Mr. Porter, I won't give you my note, but I will look it over, and if it is satisfactory I will pay it before the time expires."

Q. Have you given all the conversation?

A. I think so.

Q. Was anything said there about examining the policy?

A. I said to you a moment ago, that he would look it over, and if it was satisfactory he would pay it before it—by the time it came due.

Q. When did you next see him?

A. I cannot answer the question; I do not remember.

Q. Now, tell us about the $4,000 policy; all you know about it, from the commencement to the delivery of it; all the conversation you had with Mr Waters about that policy, as near as you can, and when it occurred?

A. A few days after this policy was delivered he said to me that he was sorry, or I guess his wife said to me that he was sorry that they had not made it $10,000, or had not let it remain $10,000. It was originally written for $10,000, I think, the application was, and then was altered before the examination, or at the time of the doctors' examination. I think Mrs. Waters said to me that she was sorry—that Mr. Waters was sorry that he had not made it for $10,000—I think that was it.

126 And I said to her that I thought I could get her another $4,000 policy on the same application; that I would try.

Q. What did she say?

A. She said that I might do it. Now, understand me—either she or he; it was one of the two; I think it was Mrs. Waters.

Q. Do you remember where that conversation took place?

A. I think it was at her house.

Q. Were they both present?

A. No, I think not; I don't remember. I would not undertake to say whether they was both present or not.

Q. How did you happen to go there?

A. My wife told me that Mrs. Waters had been to see me. I went there on the instructions of my wife.

Q. About how long after the delivery of that $5,000 policy did this conversation occur?

A. Perhaps within a week; it was right close onto this.

Q. You went to her house, did you?

A. Yes, sir.

Q. Whom did you see?

A. That I cannot answer, whether I saw Mr. or Mrs. Waters.

Q. Give us your best recollection.

A. It is my best recollection that I saw Mrs. Waters.

Q. Have you given all the conversation that occurred about that $4,000?

A. I think so, about all.

Q. In pursuance of that conversation what, if anything, did you do?

A. I went and reported the matter to Mr. Winship, and the $4,000 policy came on.

Q. When, as nearly as you can state, did you receive the $4,000 policy?

A. I think it was the latter part of June.

Q. It was dated June 30th. Can you tell about when you received it from any recollection you have, or from that date? Does that enable you to tell?

A. I should receive it anywheres from the 4th to the 6th of the month of July. We generally re-

ceive the policies about four or five days after the application is sent in.

Q. Where did you receive the $4,000 policy?

A. I received it at the office.

Q. And what did you do with it?

A. I delivered it to Mr. Waters' house.

Q. Prior to Mr. Waters' death, did you ever receive any money in payment of the premiums upon either of these policies?

A. No, sir.

127 *CROSS-EXAMINATION BY MR. HOYT.*

Q. When did you first begin to approach Mr. Waters with a view of getting his life insurance?

A. I talked with Mr. Waters in the winter I think in February, perhaps—January or February.

Q. Prior to that time you had been a soliciting agent of this company, had you not?

A. I had been a solicitor, yes.

Q. At the time you began to approach Mr. Waters you were manager of the company for this section, were you not?

(Objected to as not cross-examination; objection sustained, to which plaintiff then and there excepted.)

Q. (Letter shown witness.) State whether you authorized that letter of August 23rd.

A. Yes, sir.

Q. You were in correspondence with the company more or less, were you not?

A. Yes, sir.

Q. State whether or not you used that letter-head when you were in correspondence with the company?

A. That letter-head was got up for that purpose; for our correspondence—general office business.

Q. Then you did correspond with the company under that letter-head, did you not?

A. Undoubtedly.

Q. You saw Mr. Waters several times in regard to this insurance, did you not?

A. Yes, sir.

Q. You were very anxious to get his insurance, were you not?

(Objected to; objection sustained, to which plaintiff then and there excepted.)

Q. Are you perfectly certain as to the date when you delivered that $5,000 policy? Do you want to be understood as swearing positively to the fact that it was about the 20th of June? Might it not have been early in July?

A. No.

Q. Do you swear positively that it was not?

A. I will swear positively as regards that, yes, sir.

Q. You are certain that your recollection could not be wrong on that, are you?

A. Why, yes.

Q. Is it not a fact that that $5,000 policy was delivered about the 4th of July?

A. No, sir.

128 Q. And was it not delivered in the evening?

A. No, I think I delivered it in the morning. I am positive the $5,000 policy I delivered in the morning.

Q. What were the terms on which this insurance was made?

(Objected to; objection sustained, to which plaintiff then and there excepted.)

Q. What took place in regard to the terms of the delivery of this policy?

A. I handed the policy to Mr. Waters and said to him to give to me his note and it would be all right. Said he: "No, Mr. Porter, I won't give you my note, but I will look it over, and if it is satisfactory I will pay it before or at the time the sixty days come around."

Q. You gave him till the 1st of September, did you not?

(Objected to; objection sustained, to which plaintiff then and there excepted.)

Q. What was said?

A. That was about all the conversation that we had at the delivery of that policy?

Q. What were the terms on which this insurance was given to Mr. Waters?

(Objected to; objection sustained, to which plaintiff then and there excepted.)

Q. Did you or did you not give Mr. Waters an extension for the payment of that first premium until the 1st of September?

(Objected to; objection overruled, to which defendant then and there excepted.)

A. I gave him an extension in that note there,

asking him to be on hand by the first of the month, as it reads there.

Q. Did you not give him an extension then till the 1st of September? Was not that the understood arrangement between you at the time the delivery was made—that he was to have till the 1st of September to pay the premium?

(Objected to by plaintiff; objection sustained, to which plaintiff then and there excepted.)

Q. Was there not anything said at the time of the delivery of the policy about an extension being given until the 1st of September?

A. I do not remember that there was at that time.

129 Q. You would not swear that there was not, would you?

A. I would not swear that there was not.

Q. When you wrote this letter telling him that he was to have his money ready by the last of August; what does that letter refer to?

A. It refers to his paying his insurance.

Q. And it refers to an arrangement that there was between you that the premium was not to be paid until the 1st of September, does it not?

(Objected to.) *The Court:* That is not cross-examination. You may examine him on that point if you want to, but you make him your own witness. He can answer what he meant by that letter.

A. I meant that by the 1st of the month I should want my money in order to make my report to the Company.

Q. Did you, or did you not, give him an extension till the 1st of September?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

The Court: He has already explained it.

Q. You did give him an extension till the 1st of September?

(Objected to. Objection overruled, to which defendant then and there excepted.)

A. Why, virtually, in that note.

Q. And you had by prior conversations with him, had you not?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. When the insurance was effected it was with the understanding and agreement that an extension should be given for the payment of the first premium until the 1st of September?

(Objected to. Objection sustained on the ground that the question is leading.)

Q. What was the understanding and agreement between you and Mr. Waters at the delivery of the policy as to an extension being made for the payment of the first premium?

(Objected to by defendant. Objection overruled, to which defendant then and there excepted.)

A. I told Mr. Waters that I would give him thirty or sixty days' time, just as he wanted.

Q. Did you not say you would give him an extension?

130 A. I did not use any such word as "extension" to him, that I know of.

Q. Was not that the substance of the agreement between you—that an extension snould be given for the payment of the premium note, until the 1st of September, 1881.

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. You did not expect to get your money befo;e the 1st of September, 1881 did you.

(Objected to. Objection sustained, to which plaintiff then and there excepted.

Q. Under your arraegement with Mr. Waters by which this insurance was effected, what was the date at which the payment of the first premium should be made?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. What were the conditions as to the payment of the first premium on which that policy was delivered to Mr. Waters, at the time of the delivery?

(Objected to by defendant. Objection overruled, to which defendant then and there excepted.)

A. I asked Mr. Waters to give me his note. He said "No, Mr. Porter, I won't give you my note, but I will pay it by the time it comes due"

Q. When was the time it was to come due? About the 1st of September, was it not?

A. No, not hardly. I think about the 25th of August.

Q. If the policy was delivered the first of July, that would bring it until the 1st of September, would it not?

A. Why, yes, it would make sixty days or sixty-one days—something like that.

Q. Then it would depend on the time when the policy was delivered, would it not?

A. As regards the sixty days?

Q. Yes, sir. It was to be a sixty days' extension from the time the policy was delivered?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. When, under this policy and under this arrangement of insurance, was the payment of the first premium due? What was the agreement between you? (Mr. Wilcox.) What was said when you delivered the policy?

A. That I was to wait either thirty or sixty days.

131 Q. From the date of the delivery of the policy?

A. No, from the date of the policy.

Q. What did you mean, then, when you wrote this letter, in which you asked him to have the money on hand by the last day of August according to the rules of the Company?

(Objected to by plaintiff. Objection sustained, to which plaintiff then and there excepted.)

Q. When was the second policy delivered?

A. I think along the latter part of June.

Q. It was not delivered until after it was dated, was it?

A. No, sir.

Q. If it was dated the 30th day of June, it was not delivered until July, was it?

A. No, certainly not.

Q. Then your recollection is not absolutely certain as to the date of the delivery of these policies, is it?

A. I cannot get right down positively to the hour and to the day, no, sir.

Q. And it might have been the fact that that first policy was delivered in July, might it not?

A. No, sir.

Q. You will swear to that positively?

A. I will swear to that positively.

Q. It certainly was the fact that the second policy was delivered in July, was it not, if it bore date the 30th day of June?

A. It would be delivered in July if it bore date the 30th day of June; probably about the 5th or 6th.

Q. Why are you certain that the first policy was not delivered in July?

A. Because I would not carry a policy around with me for———

Q. But might you not have been absent from the city and have left it on the desk?

A. No, I was too anxious to get the policy delivered.

Q. Why were you anxious to get the policy delivered?

A. Because I wanted to get the matter closed up.

Q. You wanted to get Mr. Waters among the number of your insured too, did you not?

A. Oh, yes, certainly.

Q. You insured other people about that time, did you not?

(Objected to as not cross-examination. Objection sustained, to which plaintiff then and there excepted.)

Q. Now we will come down to the date of the tender of the money to you. There was a tender made to you, was there not?

(Objected to as not cross-examination. Objection sustained, to which plaintiff then and there
132 excepted.)

Q. You are not positive as to the date of the delivery of the second policy?

A. I could not get right down to the day of the month, no, sir.

Q. Was it in the morning or the evening?

A. It is my impression that I delivered the other one at night.

Q. The first one?

A. No, the last one.

Q. One of them was delivered in the morning was it not?

A. One of them was delivered in the morning.

Q. You do not recollect which one it was?

A. I think I delivered the $5,000 one in the morning.

Q. You are not positive, though, are you?

A. I am quite positive?

Q. Who was present when you delivered the second policy? Was Mrs. Waters there?

A. I cannot answer that question thoroughly.

Q. Was Mr. McKnight there?

A. I think not.

Q. If they both swore positively to the fact that

they were there, you would be led to believe that they were, would you not, your recollection being uncertain?

A. I should, yes, sir.

Q. You say nobody but Mr. Waters was present when you delivered the first policy?

A. Yes, sir.

Q. You will not swear as to who was present when you delivered the second policy?

A. No, sir.

Q. You think that was done in the morning?

A. No, I think the second policy was in the afternoon, or along towards night after I got home.

Q. To whom did you deliver it?

A. I cannot say. I was trying to think.

Q. Did you deliver it to Mr. Waters or to Mrs. Waters?

A. I could not say.

Q. What is your best recollection about it?

A. I have not got any recollection about it. I cannot for the life of me tell which one I delivered that last policy to.

Q. Are you perfectly certain that the first policy was not delivered in the evening to Mr. Waters, and that the second policy was not delivered in the morning to Mrs. Waters?

A. The first policy I delivered to Mr. Waters in the morning.

Q. Are you certain of that?

A. I am very positive.

133 Q. Suppose Mrs. Waters and Mr. McKnight should testify positively to the fact that that

first policy was delivered in the evening in the library in their house, to Mr. Waters after tea—what should you say in regard to your recollection? Would you still swear positively to the fact that you delivered it in the morning, notwithstanding that testimony, or would you not admit that you might be mistaken in your testimony?

A. It does not seem possible that I can be mistaken in it.

Q. Is it not possible that you may be? You are human, are you not?

A. Why, certainly I am human.

Q. Is it not possible that you might be mistaken?

A. I might be.

Q. Do you not remember that on one of these occasions when a policy was delivered, there was some talk about Garfield's death?

A. I do not remember it, from the fact that we were all talking about Garfield's death continually.

Q. It might have been so, might it not?

A. It might have been so, truly.

Q. If that was so, then the delivery of the policy would have been after the shooting of Garfield, would it not? You would not have talked about the shooting of General Garfield before he was shot, would you?

A. No, sir, I should not be apt to.

Q. Then if there were any conversation in regard to the shooting of General Garfield, it was after he was shot, was it not?

A. Certainly.

Q. Is it not probable that at the time when one

or the other of these policies was delivered there was a conversation in regard to the shooting of General Garfield?

A. It would be naturally probable, yes, sir, I should say so.

Q. And would not that be a pretty good way of fixing the date of the delivery of one or the other of these policies?

A. I should think it might.

Q. Don't you remember that when one policy was delivered, something was said to you by Mrs. Waters about their going to Chautauqua?

A. Mrs. Waters said that they were going to Chautauqua, yes.

Q. That was at the time of the delivery of one of these policies, was it not?

134 A. I cannot say as regards that, whether it was at the time of the application or delivery of the policy, or what.

Q. When did they go to Chautauqua?

A. That I don't know. They went about that time.

Q. About what time?

A. They went between the time of the delivery of the policy and the expiration of the sixty days.

Q. What sixty days?

A. The sixty day's time—thirty or sixty day's time that I was to give them.

Q. For the payment of the first premium?

A. Yes, sir.

Q. You did give them thirty or sixty day's time, did you not?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

(Recess until 2 P. M.)

Q. When policies were sent to you by this Insurance Company, when were you required by the Company to make your return?

(Objected to as not cross-examination. Objection sustained, to which plaintiff then and there excepted.)

Q. Why did you agree to wait sixty days for the payment of the first premium?

(Objected to as not cross-examination. Objection overruled, to which defendent then and there excepted.)

A. From the fact that I had from thirty to sixty days to either turn my policies in or pay the money.

Q. Then it was the custom of your Company in sending policies to you to give you from thirty to sixty days in which either to return the policy or the money?

(Objected to as incompetent. Objection sustained, to which plaintiff then and there excepted.)

Q. I will ask you whether in this case you observed the ordinary rules of the Company?

(Objected to by plaintiff. Objection sustained, to which plaintiff then and and there exceptep.)

Q. When you gave this postponement in this case to Mr. Waters for sixty days you did it with authority of the company, did you?

(Objected to as incompetent and not cross-examination. Objection overruled, to which defendant then and there excepted.)

A. I don't know how to answer that question. The only answer I can make is that I had
135 thirty or sixty days to pay my money in to the company or return the policy.

Q. By the court. And if it was not returned, then what?

A. I had got to pay the money then.

Q. By Mr. Hoyt. You would have to pay it yourself?

A. Yes, sir.

Q. You had authority to do that, then, in this case, did you?

Objected to by defendant. Objection sustained, to which plaintiff then and there excepted.

A. I had the authority in this way, that I had either got to pay the money or return the policy. I took that resposibility myself.

Q. Why did you give this postponement in this case?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. Was it customary for you to do that?

(Objected to, objection sustained.) Plaintiff's counsel stated that they offered to prove by the witness that according to the custom and rules of the company policies, were sent to him as the manager of the company, that he was authorized to deliver the policies and make a waiver of the time of payment from thirty to sixty days and that the company would accept his personal responsibility and had him under bond to take the premiums and

pay them, the company looking to him for their payment.

(Offer overruled to which plaintiff then and there excepted).

RE-DIRECT EXAMINATION.

Q. State whether or not whatever authority you had as agent for this company was in writing?

A. I had a contract with the company.

Q. Was that contract in writing?

A. It was a printed contract. Printed and written together.

RE-CROSS EXAMINATION.

Q. I will ask you whether or not, in accordance with the rules and custom of your company, you had authority to give this kind of a postponement?

(Objected to as not cross-examination. Objection sustained, to which plaintiff then and there excepted.)

DEPOSITION OF J. O. WINSHIP.

John O. Winship, called by defendant, being duly sworn testified as follows:

136. Q. By Mr. Wilcox. Where did you reside in 1881 during the month of June and July?

A. In Cleveland, Ohio.

Q. At that time were you in any way connected with the Union Mutual Life Insurance Company?

A. I had charge of their law, real estate and

agency business in Ohio and some other States.

Q Where was your office?

A. No. 164 Superior street, Cleveland.

Q. State what, if any, connection you had with the application made by Alfred J. Waters and the two policies, the $5,000 and the $4,000 in suit here.

(Plaintiff's counsel objects to counsel testifying. Objection overruled.)

A. I had no connection whatever with taking the application; know nothing about its being taken, as far as the first policy is concerned. After the first policy came, in consequence of a conversation with Mr. Porter I wrote a letter to the home office.

Q. (Paper shown witness.) State whether or not that is the letter.

A. That is the letter.

Q. After having sent this letter to the home office what next happened if you know?

A. I know of nothing.

Q. Have you any knowledge about the second policy being returned?

A. Not any. (Defendant offered and read in evidence the deposition of Henry D. Smith.

Defendant also offered in evidence the application for the policies in question, and letter of John O. Winship to the defendant company, dated June 27, 1881. Plaintiff objected to the introduction of the letter. Objection overruled, to which plaintiff then and there excepted.

DEPOSITION OF G. C. ASHMAN

Dr. George C. Ashman, called by the defendant, being sworn testified as follows:

Q. By Mr. Wilcox. Where do you reside?

A. I reside at 798 Republic street, Cleveland.

Q. How long have you lived in the city?

A. About thirteen years.

Q. What is your profession or business?

A. Physician and surgeon.

Q. How long have you practised medicine and surgery?

A. Between eleven and twelve years.

Q. Were you acquainted with Mr. Alfred J. Waters prior to his death?

A. I was.

Q. And with Mrs. Waters?

A. I was.

Q. Do you remember the occasion of the death of Mr. Waters?

A. I do.

Q. I will ask you if you were called at that time?

A. I was called some hours previous to his death. I was not present at the time of his death.

Q. At what time and on what day, if you can tell, were you called and by whom?

A. I was called in the afternoon of a day, possibly Thursday, in the week, as my memory serves me; I cannot tell exactly; nor would I be able to fix, from memory, the exact day of the month.

Q. Was it the day upon which he died?

A. As I understand, the day preceding his death.

It was in the month of August, as I remember it. It was in the afternoon—possibly near two o'clock in the afternoon. I should say it was within a few minutes of two o'clock a young man came to my residence for me, and I immediately went to his house, some quarter of a mile distant.

Q. What condition did you find Mr. Waters in when you went to see him?

A. I found Mr. Waters lying upon the bed in a state which we commonly describe as being that of collapse. That is to say the surface of his body was cold, his face was pinched, skin tightly drawn over his face, his lips purple, sweating profusely, circulation of blood very feeble indeed, pulse at the wrist almost imperceptible. He was conscious, in some measure, at least, and could speak.

Q. Do you how long he has been in that condition prior to your visit?

A. I do not, personally; a statement was made to me at that time by Mrs. Waters.

Q. State what, if anything, Mrs. Waters said to you, or what you learned from Mrs. Waters, in regard to his condition?

(Objected to as incompetent. Objection overruled, to which plaintiff then and there excepted.)

A. Mrs. Waters stated to me that he had been sick since the preceding Saturday night, as I remember; had been somewhat better, and been up writing letters the day before—on Wednes-
138 day of this week he had been up attending to some business in the shape of writing, and that during the day, the day on which I was called,

he had had repeated movements from his bowels, and had fallen into this condition; had then been in this condition some length of time. I cannot say how long she stated to me, but as I remember it some few hours that he had been sinking into this condition.

Q. How long had you known Mr. Waters?

A. If my memory serves me right, some five or six years previous to this time.

Q. I will ask you if at any time prior to his last sickness you were called to attend him for any illness?

A. I had been called to see him two or three times previous to this.

Q. When last before the final sickness?

A. I think it was perhaps a year or something more than a year.

Q. What was the matter with him at that time, if you remember?

A. There seemed to be a functional disturbance of the stomach and liver, ordinarily expressed by the term bilious—something of constipation and disturbed function of liver and stomach.

Q. Prior to that visit when had you visited him?

A. My recollection of it is that it was somewhere from one to two years previous to that time that I had been called to see him for a similar difficulty.

Q. Can you give an idea of how many times in all you have been called to see him for an illness?

A. I think that the first time I was called to see him I made him, perhaps, three or four visits, possibly five—somewhere from three to five visits.

Q. About when was that?

A. That I think was the first time I was called to see him, some two or three years prior to his death; and the last time, perhaps, two or three visits. I am giving now my recollection of it. I would not wish to be understood that I specify exactly the number of times.

139 *CROSS-EXAMINATION BY MR. HOYT.*

Q. You say you think you came in to see him on Thursday?

A. That is the best of my recollection.

Q. He died that night, did he not?

A. I was not present at the time of his death; I know nothing only of that certificate coming to me as health officer.

Q. Well, as a matter of fact, you know, do you not, that he died on Thursday night at 12 o'clock?

A. I was not present and did not see him after that time that I saw him in the afternoon.

Q. How about the certificate of death?

A. The certificate of his death gave the time of his death at that time, it was dated that day.

Q. Thursday?

A. On a Thursday.

Q. Then, you went in on the afternoon at about 2 o'clock of the same day that he died?

A Yes, sir.

Q. You say you found him then in a condition of what you term collapse?

A. I did.

Q. Was he suffering from a congestive chill?

A. That would not be the term that I should use to describe his condition; it was such a condition as I have seen in other cases; in instances where there has been a somewhat rapid and profuse drainage from the body, such as we would see in cholera conditions.

Q. A sort of cholera morbus, was it not, you judged he had been suffering from?

A. It was, as I say, more like cholera than anything else that I can use to describe it.

Q. Suppose that under such circumstances he should take a bath, would not such a thing as that be very apt to induce such a state of things as this —a cold bath?

A. It would be very likely to aggravate it.

Q. And it might be the direct cause of the difficulty, might it not?

A. It would depend somewhat upon the length of bath and the degree of cold. It would be likely, though, to tend to that, to drive the blood
140 from the surface.

Q. Suppose that a man was perfectly well and in the ordinary enjoyment of health, and that on Friday night, we will say, or Saturday, he ate a hearty supper of milk, bread and butter and tomato salad, and then suppose that the next day he should be taken with some distress in his stomach and some evidence of diarrhea, to what would you attribute the trouble that he was suffering from?

A. I should attribute it primarily to indigestion.

Q. Caused by his eating?

A. Caused by what he had taken.

Q. It might be true, might it not, that man would be in perfectly good health and bring about such a condition of things as that, at that season of the year, by such indiscretion in eating?

A. I should say it might; that would simply—

Q. (Interrupting.) Now, it might be possible, might it not, that a man like that would mend from this little difficulty that had set in—this diarrhea tendency—and that then if he went on and attended to his business, we will say wrote on Saturday 50 or 40 letters, on Sunday several letters, on Monday several letters, on Tuesday several letters and on Wednesday several letters, and on the following Thursday should go in and take a cold bath, such a condition as you found Mr. Waters in might be very naturally induced by such a thing as that, might it not?

A. It would tend to bring on disturbances and aggravate any difficulty that might exist at that time.

Q. And the man might have been perfectly well previous to his indiscretion in eating?

A. I suppose he might, as far as we ordinarily use the term.

Q. How long did you see Mr. Waters when you were called in at that time?

A. I should say I was present not more than fifteen minutes.

Q. You knew Dr. Brown was in attendance, did you not?

A. There was no one there when I came, but

within a few minutes Dr. Brown came in and I resigned, as he had been attending him before,
141 resigned to his care and left.

Q. You say that you had some consultation with Mr. Waters previous to this time.

A. As I say, I was attending him previous to this time.

Q. What was the trouble with him when you saw him a year previously to this?

A. My impression is that he had been away from home—been troubling in connection with his business and came home with headache and some constipation and disturbances, as I term them functional disturbances.

Q. You mean functional disturbances as distinguished from organic, do you not?

A. Yes.

Q. Functional disturbance may very possibly arise from slight causes, may it not?

A. Functional disturbance, an organ failing to do its work, but not inflamed, not seriously disturbed, other than simply a suspension of function.

Q. In other words, you do not want to intimidate the jury by such a broad statement as "functional disturbances"? If a man, for instance, were constipated in that way—he might be constipated by the intestine being completely occluded—being completely stopped up?

A. Then it would be more than functional—constructional.

Q. Mr. Waters had nothing of that sort, had he?

A. Nothing of that sort.

Q. Then you would say if a man's organs were not completely stopped up and he was constipated, that there was some functional disturbance, would you not?

A. I would say so.

Q. Then when you talk about functional disturbance and all that, what you mean is that he was tired, probably had a little headache, may have eaten something that tied his bowels up, and that he was constipated?

A. That was my intention.

Q. It was something merely temporary, was it not?

A. It appeared to be temporary. It passed away.

Q. Did you make any examination of his liver?

A. Nothing further than to inquire for pains or soreness.

142 Q. There was not anything of that sort, was there?

A. Nothing of that kind stated to me, nor did I find anything of that kind.

Q. So that there was not anything but a mere temporary ailment, such as any man who travels on the railroad a good deal, in perfectly good health constitutionally, might suffer from, was there?

A. I could not say that there was any examination that would lead me to such a conclusion as that.

Q. Certainly, from such examination as you made you would not reach any contrary conclusion?

A. I did not reach any contrary conclusion.

Q. Such troubles as those are very common with men, are they not?

A. They are.

Q. You have been constipated yourself, have you not?

A. I have.

Q. The majority of mankind suffer from just this kind of functional disturbance occasionally, do they not?

A. I think they do. It is a matter of opinion.

Q. You remember, do you not, that when you testified in this case before you stated that in your judgment, from the examination you made, Mr. Waters was a first-class insurance risk?

A. I cannot recall it.

Q. Never from any examination that you made of Mr. Waters, prior to the time when you were called in, when he was in this collapsed state on the day that he died, did you discover anything that would make him a bad insurance risk, did you?

A. I never had.

Q. Do you say that he came to see you two or three years before he died, or two or three years before this time that he came to see you a year previous?

A. My recollection is that some three years, perhaps, before he died, two years before this other attack, that I attended him. I attended him before for a somewhat similar difficulty.

Q. Nothing serious in that, was there?

A. Nothing, at any rate, so serious but what he

was up and around in a few days, and was at his work again. He passed out of my sight.

143 Q. It was nothing more than a mere functional disturbance of the bowels was it—purely temporary?

A. Simply the liver and bowels, or the digestive apparatus.

Q. Is there anything in that condition of things that would make a man like Mr. Waters a bad risk for an insurance company?

A. I should answer that by simply saying that a man subject to such disturbances was a little more liable to be made sick by indiscretions of diet or exposure to weather than a man who was not subject to such disturbances.

Q. You say that a majority of men have these little functional disturbances?

A. Some will go longer between times than Mr. Waters appeared to, probably. I do not know that he did not suffer at other times; I only know that I attended him for those two times.

Q. Taking the times that you noticed these little functional disturbances of his bowels, was there anything to be considered unusual or frequent in them?

A. Not at all.

Q. And the fact that he had had two little fits of constipation with an interval of two years would not impair him as an insurance risk, would it?

A. Nothing that I discovered would have made him appear a bad risk, or would have failed to pass him as a good risk, that I know of.

Q. When you testified in this case before did you

not state that Mr. Waters came to your residence when he was examined by you at these two times?

A. I think at another time he came to my residence or office, or possibly both, and I gave him a prescription. I think that was my testimony before. That is my recollection of it, at any rate. In addition to these two times I think Mr. Waters came to my house. I recollect it pretty distinctly, and at one time, at any rate, he came to my house for a prescription at another time.

Q. What did he get when he came there? Some little thing for a cold or something?

A. He got a prescription.

144 Q. What for?

A. A somewhat similar attack, perhaps. I cannot recollect just now what for. At any rate he was not sick enough to require my going to his house, and he came to my residence.

Q. You never discovered anything in the condition of Mr. Waters at any of the times you saw him that is not liable to occur to any man in good health, did you?

A. I do not think I could put it as strong as that. You might say the majority of men; but any man—I could not go as far as that. Some men never have such attacks. I know some. The average man—such attacks as the majority of men have.

Q. What kind of a build was Mr. Waters?

A. Mr. Waters was a man perhaps five feet nine inches in height, and he would weigh ordinarily, probably, somewhere from 145 to 150 pounds, possibly 155 pounds.

Q. He was a vigorous, active man, was he not?

A. He was an active man,—a very active man.

Q. In your judgement he was a sound, vigorous man, was he not?

A. I do not know that I can go beyond what I have already answered.

Q. As far as you know, he was, was he not?

A. I knew of no serious defect in him in any way.

Q. No organic difficulty?

A. No organic difficulty, or serious defect; probably was not a perfectly sound man; very few are; almost never found one.

Q. He certainly was an ordinarily sound man, was he not?

A. Yes, I should say that he was.

Q. And he was a more than ordinarily vigorous active, energetic man, was he not.

A. He was more than ordinarily active, mentally and physically, so far as I know. He certainly was mentally.

Q. He travelled a good deal, did he not?

A. Travelled most of the time, I think.

Q. I will ask you whether or not, in your experience as a physician you have not found it to be a fact that that kind of a life is a pretty severe strain on a man?

A. Yes, it is my opinion that travelling as men usually travel in such business, it is a very
145 trying life.

Q. If he had any organic difficulty, that kind of a life would have been apt to have made it

known, would it not, more than a calmer, quieter life at home?

A. Yes, anything that is tiring would be apt to develope it—to develope the weak spots.

Q. Then the fact that he enjoyed such good health as he did, leading the kind of a life he did, would be pretty strong evidence as to his vigorous physical condition, would it not?

A. It would certainly go to show that he had power to endure great work—strain.

RE-DIRECT EXAMINATION.

Q. Mr. Hoyt asked you if there was anything in this sickness which would make Mr. Waters not a good risk. Do I understand you to say that while he was thus sick he would at that time be a good risk?

A. Not at all. I do not wish to be understood that at all.

Q. But that he recovered, and after that he would be all right?

A. I understood that. In his average health, his ordinary health, he would be considered a fair risk —a good risk.

Q. What would you say about his being a good risk at the time you called at his house, on the afternoon of the 25th day of August 1881?

A. I should say that he was not a fit subject for insurance of any kind at that time.

RE-CROSS EXAMINATION.

Q. Would his condition when you called on the 25th day of August, 1881, at two o'clock in the afternoon, have anything to do, after having stated to you in regard to what he had eaten, with affecting him as a risk in July or June previous?

A. None that I know of.

DEPOSITION OF B. P. BROWN.

Dr. B. P. Brown, called by the defendant, being sworn testified as follows:

Q. (By Mr. Wilcox.) Where do you reside?

A. No. 1 Sprankle avenue, Cleveland.

Q. Were you acquainted with Mr. Alfred J. Waters in his lifetime?

A. I was, sir.

146 Q. How long had you been acquainted with him prior to his death?

A. About ten or twelve years.

Q. I will ask you to look at that document (affidavit on proof of death,) and state whether or not that is your signature?

A. That is, sir.

Q. You swore to that, did you?

A. Yes, sir.

Q. Do you remember the occasion of Mr. Waters' death?

A. Yes, sir.

Q. Were you called to attend him professionally during his last sickness?

A. Yes, sir.

A. State on what day you were first called during the last sickness?

A. On the 23rd of August, 1881, I think it was, I was first called to see Mr. Waters.

Q. How many times did you visit him on the 23rd?

A. Twice.

Q. When did you next visit him?

A. The next day, the 24th.

Q. How many times on the 24th?

A. Twice.

Q. And you next visited him when?

A. On the 25th.

Q. And how many times on the 25th?

A. I was called twice and stayed nearly all night.

Q. That is, three times with the last visit?

A. Yes. sir.

Q. Prior to his last sickness had you ever been called professionally to attend him?

A. No. sir.

CROSS-EXAMINATION BY MR. HOYT.

Q. State whether or not you were Mr. Waters' physician previous to the time of the last illness that you speak of?

A. I was not.

Q. Whose physician were you? Were you Mrs. Waters' physician?

(Objected to. Objection overruled. To which defendant then and there excepted.)

A. I was.

Q. You knew Mr. Waters more or less intimately, did you not?

A. Yes, sir.

Q. What kind of health did he ordinarily have?

A. Had good health.

Q. He was a sound, vigorous, active man, was he not?

A. To all appearance he was.

Q. A man actively engaged in business, and a man of physical vigor, was he not?

147 A. Yes.

Q. You never knew of his being seriously sick, did you?

A. No.

Q. Over how long a period were you in the habit of going to Mr. Waters' house as the physician of Mrs. Waters?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. About how long were you acquainted with Mr. Waters?

A. About twelve years, at least; perhaps a little longer.

Q. And during all that time were you more or less in attendance in his household on his family?

A. Yes, sir.

Q. What was his condition during all those twelve years—good apparently?

A. As far as I knew. I was not his physician.

Q. Was there anything about Mr. Waters' appearance that would indicate good health during this time that you knew him?

A. He seemed perfectly well.

Q. The first time that you were ever called in was on the 23rd of August, was it?

A. Yes.

Q. What day of the week was that?

A. My impression is it was on Tuesday; I could not swear positively to the date.

Q. What condition did you find him in when you came in? You did not think him seriously sick, did you?

A. I did not.

Q. What did he seem to be suffering from?

A. A kind of cholera morbus.

Q. A little diarrhoea?

A. Yes.

Q. He did not have any dysenteric symptoms, did he?

A. None at all.

Q. What did you attribute this little disturbance to—something he had eaten?

A. Something he had eaten.

Q. That is liable to occur to any man, is it not?

A. Yes.

Q. You say you come in the morning?

A. Yes.

Q. Did you come expressly to see Mr. Waters, or did you come to see Mrs. Waters, and then Mrs. Waters ask you to see Mr. Waters?

A. No; I came to see him.

Q. You gave him some simple remedy, did you not?

A. Yes.

Q. You did not consider his condition alarming, did you?

A. I did not.

148 Q. There was nothing to excite any alarm on the part of yourself or himself or his family?

A. None at all, sir.

Q. Why did you come back there that night?

A. Through the request of Mrs. Waters. She said she would like to have me come down and see him at night.

Q. He did not ask you to come back, did he?

A. No.

Q. He did not seem to consider himself very sick, did he?

A. No.

Q. He did not tell you so, did he?

A. No; he said he would soon be all right again.

Q. When you came back there in the morning he was in his library, was he not?

A. Yes; attending to his business, I suppose.

Q. Did he say anything to you about what he was doing?

A. He said he was so far behind with his work that he had to do something.

Q. You did not prohibit his doing any work, did you?

A. Oh, no.

Q. You came back again that night, and how did you find him then?

A. He was a little better that night. He was a little tired from the excessive work he had been doing.

Q. There was nothing in his condition then that was alarming?

A. Nothing at all.

Q. Just a little diarrhoea, perhaps—a little pain in the bowels?

A. Some little pain. Had, perhaps, some little fever.

Q. You came back the next morning?

A. Yes, sir.

Q. Who asked you to come the next morning?

A. She did.

Q. He did not ask you to come, did he?

A. No.

Q. How did you find him?

A. I found him up and around. I thought he was better that morning than he was the night before.

Q. Did you change your prescription or continue it?

A. I have forgotten now. I think I continued the same remedy.

Q. He seemed to be acting pretty well, did he not?

A. Doing very nicely.

Q. In the evening you were in the habit of making regular trips in that neighborhood, were you not?

A. Yes. Unless there was sickness I would not of course.

Q. But you were at that time, were you not?

149 A. Simply to see him. I had no other patient in the neighborhood.

Q. You came in again at night. How was he that night?

A. He was better than he was in the morning.

Q. The symptoms seemed to be abating, did they?

A. Yes.

Q. Did you come around the next morning?

A. Yes.

Q. Who asked you to come the next morning?

A. Mrs. Waters did.

Q. On the second day he had done a day's work, too, had he not?

A. Yes, he had been writing.

Q. That was Thursday, the day of his death, was it not?

A. That was the day of his death; yes.

Q. When you came the next morning he was up, was he not?

A. Yes.

Q. In his library?

A. I think he was. I think that she called him then.

Q. He was writing, was he not?

A. I did not see him. I was not in the library at all.

Q. How was he that morning? He was better still, was he not?

A. Yes; seemed very nicely; so much so that I did not think I would call again that day.

Q. You considered him practically cured, did you not?

A. Yes; I did.

Q. And you went away considering him practically cured?

A. Yes.

Q. During these visitations that you made you examined him after your usual customs with some degree of care, did you not?

A. Yes.

Q. And the whole result of this examination was that he was suffering from a little temporary difficulty, not at all alarming, and Thursday morning when you went he was so much better that you did not intend to go back to him; you practically thought he was cured?

A. Yes.

Q. That nature would take its course?

A. Yes.

Q. When did you next call to see him?

A. About two o'clock in the afternoon—somewhere thereabout.

Q. How did you find him then?

A. I found him in a state of collapse; almost in a dying state.

Q. Any congestion about him?

A. Yes.

Q. What was it that made such a complete change from the time you saw him in the
150 morning to the time you saw him in the afternoon at two o'clock?

A. I did not know; I made inquiry from him. He said he had taken a bath in the room; there was a bath tub, filled with cold water, and the water running in the water closet at the same time.

He said he was so warm that he went in there and took a bath, and when he took the bath took a very severe chill; thought he was going to die. He said he called his wife, and she had to help him out.

Q. To what do you attribute Mr. Waters' death?

A. A chill.

Q. What was the chill caused by?

A. I suppose by the application of cold water.

Q. Let me ask you whether there was anything in the manner in which Mr. Waters died that would indicate that he was not an ordinarily well man?

A. Not as far as we could see.

Q. You would have been apt to discover that, would you not, in all these examinations that you made and in the conversations that you had with him?

A. I think so; yes, sir.

RE-DIRECT EXAMINATION.

Q. You prescribed for him each time you came, did you not?

A. I did; yes.

Q. And you came each time by the request of Mrs. Waters?

A. Yes; I did.

Q. And to attend Mr. Waters?

A. Yes.

RE-CROSS EXAMINATION.

Q. When you say that you prescribed for him,

do you mean that you gave him a separate prescription on each and every visit?

A. No

Q. Or just told him to continue the medicine which you had already given him?

A. I have forgotten. He had medicine enough.

Q. You did not give him any separate and distinct prescriptions or different medicines on each occasion, did you?

A. Not that I know of.

Q. You would only have given him another prescription in case the original medicine you had ordered had been exhausted?

A. Yes.

Q. Your recollection is that you continued the same remedy from the very first?

A. Yes.

Q. (By Mr. Wilcox.) From the first time you called, do you mean you continued the same remedy?

151 A. Not after the chill.

Q. But you prescribed each time you were there?

A. Yes.

Q. (By Mr. Hoyt.) When you say you prescribed each time you were there what do you mean by that? Do you mean that you wrote a separate prescription each time?

A. No.

Q. (By Mr. Wilcox.) You may not have written any?

A. No.

DEPOSITION OF ELECTA L. WATERS.

Electa L. Waters, called by the defendant, testified as follows:

Q. (By Mr. Winship.) Did your husband employ any physician while he was at Chautauqua?

A. Not that I know of.

Q. Did you see any physician at the house where you were stopping when he was there?

A. I do not remember that I did.

Q. You say you do not know of his calling any physician while he was there?

A. In fact I know that he did not.

Q. In the year before he died, the year 1879, how frequently did your husband employ a physician?

A. The only physician that I ever knew of his calling in that year was Dr. Ashmun, that you had here as a witness.

Q. The year before that what physician did he call?

A Dr. Ashmun is the only one I know of.

Q. In those three years, up to the time Dr. Brown came?

A. Dr. Ashmun is the only physician I know of his having after we moved into that place where we live now. Still there might have been someone; I do not remember.

CROSS-EXAMINATION BY MR. HOYT.

Q. How long were you married to Mr. Waters?

A. Twenty-one years.

Q. During all that time did he have any serious illness up to the time he died?

A. He had a very severe fever, years ago.

(Objected to. Objection overruled.)

Q. He was a man in good health all the while, was he not?

A. Yes sir, a very healthy man.

Q. How was he as to being a vigorous man?

152 A. He was a very active, vigorous man.

Q. He was travelling a good deal of the time, was he not?

A. He was travelling a great deal of the time.

Q. Was he troubled very much with what Dr. Ashmun calls functional disorder of the bowels?

A. The only time I knew him to be troubled was when he called Dr. Ashmun.

Q. Then it was merely temporary, was it not?

A. Well, I think so.

Defendant's counsel offered and read in evidence two depositions of Nicholas De Groot, the deposition of Henry D. Smith, and the charter and by-laws of the defendant Company, (which are found on page 155.)

DEPOSITION OF W. S PORTER.

Rebuttal Testimony.

W. S. Porter, being recalled by the plaintiff, testified in rebuttal as follows:

Q. (By Mr. Hoyt.) When did you become and begin to advertise yourself as the Manager of this Company?

(Objected to; objection sustained, to which plaintiff then and there excepted.)

Q. State whether or not, from February, 1881, down to September, 1881, you took any notes for the payment of the first premiums on policies?

(Objected to. Objection overruled, to which defendant then and there excepted.)

The Court: He can state what he has done, but he will have to trace it to the Company.

A. I have taken personal notes—notes payable to myself.

Q. State how frequently you have done that?

A. I cannot state how frequently exactly, but I have done it often.

Q. Was it not your custom during that period to waive the payment of the first premium and take a note for it?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. I will ask you whether in any case you took notes payable to anybody else but yourself?

A. When I was the agent of the Company?

Q. Yes, sir?

A. No, sir.

Q. Let me ask you whether you did not
153 take a note payable to Mr. Winship in certain cases?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Q. For about how many policies during that period that I speak of did you take notes for the first premium?

A. I could not answer that; I do not know. I took a number of notes during my connection with the Company.

Q. For the payment of the first premium?

A. Yes, sir.

(Mr. Wilcox.) This is all under objection.

Q. State whether or not during your connection with the Company and while Mr. Winship was connected with it, you know of notes being taken by Mr. Winship for the payment of first premiums,—whether it was not the custom?

(Objected to. Objection sustained, to which plaintiff then and there excepted.)

Plaintiff offered to prove in contradiction of the testimony of De Groot, that it was the custom of the Company, through its agents, to take notes other than those mentioned in the deposition of De Groot, in payment of first premiums.

Ruled out because the testimony ought to have been offered in chief. To which plaintiff then and there excepted.

ELECTA L. WATERS RECALLED.

Electa L. Waters, being recalled testified as follows:

Q. (By Mr. Hoyt.) I will ask you whether at the time of the delivery of the first policy, anything was said by Mr. Porter, the manager of the Company, to your husband about his taking the policy and looking it over?

(Question objected to because it assumes that

Porter was the manager. Objection overruled, to which defendant then and there excepted.)

A. I was present when that first policy was delivered—the five thousand dollar policy.

Q. Did Mr. Porter say to your husband then that he was to take the policy and look it over?

A. He did.

Q. Did Mr. Waters say to Mr. Porter that he would take the policy and look it over?

A. Yes he said that, and he farther said——

(Objected to by defendant.)

154 Q. What further did he say?

(Objected to by defendant. Objection overruled, to which defendant then and there excepted.)

A. He said, "Your Company knows all about this arrangement do they."

(Defendant's counsel moved to strike out answer. Motion granted, to which plaintiff then and there excepted.)

Q. Did Mr. Porter at that interview ask your husband to give his note for the amount of the premium?

A. I think perhaps he did, and he refused to give it.

Defendant's counsel moved the Court to take from the jury all testimony relating of taking of notes by Mr. Porter. Motion overruled, to which defendant then and there excepted.

155 Depositions taken before me, Josiah H. Drummond, Jr., a Notary Public, within and for the County of Cumberland, in the State of

Maine, pursuant to the annexed notice at the time and place therein specified, to be read in evidence on behalf of the defendant in an action pending in the Circuit Court of the United States, Northern District of Ohio, E. Div. in the State of Ohio, in which Electa L. Waters is plaintiff and The Union Mutual Life Insurance Company is defendant.

Present Josiah H. Drummond on behalf of the defendant, and William K. Neal on behalf of the plaintiff.

DEPOSITION OF H. D. SMITH.

Henry D. Smith, of lawful age, being by me duly sworn as heretofore certified, deposes and says as follows:

Q. State your name, residence, occupation and age.

A. Henry D. Smith; Portland, Maine; Secretary of the Union Mutual Life Insurance Company; 32 years of age last August.

Q. State what applications, if any, Alfred J. Waters made to said Union Mutual Life Insurance Company for insurance, and what policies have been issued on the life of said Waters by said Company?

A. We received an application on the life of Alfred J. Waters, an office copy of which is hereto attached, marked "Exhibit A.," and issued policy numbered 73,549 on his life, dated June 16th, 1881, in the amount of five thousand dollars, which policy was forwarded to our agent, W. S. Porter, of Cleveland, Ohio. Subsequently we received a letter from

John O. Winship, an agent of the Company, dated June 27th, 1881, a copy of which is hereto annexed, marked "Exhibit B.," and we issued policy numbered 73,621 on the life of said Waters, dated June 30th, 1881, in the amount of four thousand dollars, which policy was also forwarded to Mr. Porter.

Plaintiff's attorney seasonably objected to that portion of the answer relating to the letter
156 of John O. Winship as not responsive to the question, and also to the annexing of copies of application and letter to this deposition without proof of loss of the original, or that the same are not in the possession of the defendant company.

3. Q. Was there any other application upon which these policies, or either of them, were issued?

A. No.

4. Q. What authority had Warren S. Porter to act for the company?

A. His agreement with this company dated July 15th, 1880, and the instructions to agents contained in the Agents Manual, a copy of which instructions is hereto annexed, marked "Exhibit C."

(Plaintiffs attorney objects to annexing copy marked "Exhibit C," no proof of correctness thereof, or reason for now production of original being given; also as immaterial in this suit.)

5. Q. Please state orally what were the powers of Mr. Porter as an agent of the Company in relation to delivering policies and receiving premiums?

(Plaintiffs attorney objected to above question as immaterial and incompetent in this suit.)

A. Should the life insured become impaired, or

anything transpire or information come to the knowledge of the agent making the risk less desirable after the application is taken, and before actual delivery of the policy to the assured personally, the agent must not deliver, but return the receipt and policy to the office, and notify the company immediately. No premium receipt is to be delivered until the premium has actually been paid during the lifetime of the life insured, and while the policy is otherwise in force, nor if the date mentioned and fixed in the policy for payment of premium has passed, unless the insured life is in sound health, and of correct, sober and temperate habits, agents are not to make any changes whatsoever in forms of applications for insurance
157 or in policies or receipts for premiums, or to waive forfeiture or any condition of the application, or of a policy or premium receipt named an extra for special risks, issue permits of any kind, or bind the Company in any way, they being permitted simply to solicit applications for insurance, and to make manual delivery of policies and premiums, receipts to the assured under the rules and instructions of the Company. And no information, statement, or representation at any time, or from time to time given or made by the assured or insured to any such agent, or to either of them by him, or to the assured by any other person, unless such information, statement or representation be reduced to writing, and promptly presented by the assured to the President of the Company, will be deemed notice to the Company or will effect its

right to treat the same as never given or made. Agents have no authority to agree that the insurance shall hold good otherwise than by the actual payment of the premiums when due, by and according to the terms of the policy, nor to give credit on account of the Company. Agents are not authorized to receive any premium on behalf of the Company unless they shall have been furnished a receipt therefor signed by the President, Secretary or Assistant Secretary, and it is actually in their hands for delivery, and then only in accordance with the express terms thereof. Agents have no authority to waive or postpone payment of premiums, to waive forfeitures or make, alter or discharge any contracts on behalf of the Company, or to change, modify, alter or waive the conditions expressed upon any policy, application or receipt, or other document of this company. Agents are not authorized to make the Company liable for any expenditures whatever, and no charges for advertising, printing, stationery, or other expenses
158 will be allowed, unless special permission is obtained in writing in each and every case.

(Answer further objected to by plaintiffs attorney as not responsive to the question numbered 5.)

6 Q. What other authority, if any, had said Porter in relation to delivering policies and receiving premiums than what you have already stated?

(Plaintiffs attorney objects as immaterial and irrelevant.)

A. None other.

(Without waiving any of the objections already

made, plaintiffs attorney propounds the following cross-interrogatories.):

1. Q. How long have you been acting as Secretary of the Union Mutual Life Insurance Company?

A. I was appointed Secretary in September, 1881.

2. Q. Where is the original application of Alfred J. Waters named in your answer to interrogatory 2, if you know?

A. We sent the original application to John O. Winship some time last summer or fall.

(At 3:45 adjourned to same place at 9 o'clock in the forenoon of Friday, May 12th, 1882.)

(Friday, May 12th, 1882, met at same place at 9 o'clock, same parties and counsel present.)

3. Q. Is said application now in the hands and possession of any agent or attorney of the defendant Company; if yea, please state his name and residence, if you know it?

A. I do not know; as before stated, we sent the application to John O. Winship, who is now agent of the Company.

4. Q. What knowledge, if any, had Alfred J. Waters at the time of making application for insurance as the time of issuing of the policies named by you, so far as you know, concerning the agreement between the Company and Warren S. Porter, dated July 15th, 1880, or of the instructions from said Company to its agents, mentioned by you in answer to interrogatory 5?

A. I do not know.

159 5. Q By whom were the Exhibit "A," "B" and "C" written, if you know?

A. Exhibit "A" was written by a Mr. Dow, and J. Frank Lang, clerks in the Directors' office of the Company in Portland. Exhibit "B" is in the handwriting of Mr. Dow aforesaid. Exhibit "C" is also in Mr. Dowt's handwriting.

6. Q. Have you compared these exhibits with the originals or either of them?

A. I have compared Exhibit B with the original. I have not compared Exhibit A and C with the originals.

7. Q. Is your answer to direct interrogatory 5 made from any personal recollection respecting the matters inquired of, or was it read by you from Exhibit "C" in answer to said interrogatary?

A. I read it from Exhibit "C."

8. Q. Does Exhibit "C" contain a copy of all instructions issued by the Company to Warren S. Porter, or is it an abstract from the instructions so issued?

A. An abstract.

9. Q. Will you produce and annex to your deposition the original instructions from which you say Exhibit "C" is an abstract?

A. I will, marked Exhibit "D."

10. Q. When and by whom was Exhibit "D" sent to Mr. Porter?

A. I never said Exhibit "D" was sent to Mr. Porter.

11. Q. Was it as a matter of fact, ever sent to him?

A. The identical "Exhibit D?" No.

12. Q. Will you produce and annex the instruc-

tions which you say was sent by the Company to said Porter?

A. If you mean the original instructions, they are not in my possession.

13. Q. Have you at any time, and if so, when, compared "Exhibit D," with the original instructions sent by the Company to said Porter?

A. No.

RE-DIRECT BY JOSIAH M. DRUMMOND, COUNSEL FOR DEFENDANT.

7. Q. Were you connected with the said Insurance Company before September, 1881, and if so, how long, and in what capacity?

160 (Plaintiff's attorney objects to the question as immaterial.)

A. Yes, for about seventeen years; I was clerk until about July, 1877, which position I held until I was appointed Secretary, at which time I was appointed assistant Secretary in September, 1881.

8. Q. Have you the means of knowledge and actual knowledge of what applications said Waters made to said Company for insurance?

A. Yes, sir.

9. Q. In what manner are instructions given to agents like Mr. Porter in respect to their powers and duties?

Plaintiff's attorney objects to the question as immaterial and incompetent.

A. By their contracts with the Company and the agent's manual.

10. Q. Is the agents manual a printed document?

A. Yes, sir.

11. Q. Whether or not "Exhibit D" is the agents manual in use by the Company during the year 1881?

(Plaintiff's attorney objects to the question, it not appearing that "Exhibit D" is a copy of the instructions furnished by said Company to said Warren S. Porter.)

A. It is, and the only one.

CROSS-EXAMINATION RESUMED BY WM. K. NEAL, PLAINTIFF'S ATTORNEY.

14. Q. Is Warren S. Porter still an agent of the defendant Company?

A. He is not now an agent of the Company, but is in the employ of John O. Winship, one of our agents.

15. Q. When did said Porter cease to be an agent of said Company?

A. I cannot give exact date without reference to our records, but think the early part of the year 1882. Henry D. Smith.

EXHIBIT "A."

"Exhibit A." Application for insurance in the Union Mutual Life Insurance Company of Maine.

Form A. The following questions will be
161 answered by the person proposed for Insurance.

1. Give your full name. Alfred J. Waters.

Occupation or employment; if more than one state all; and the particular kind of each. Fire Insurance Adjustor.

Residence, Town, County and State. Cleveland, Cuyahoga, Ohio.

Place of Business. Cleveland, Cuyahoga, Ohio.

Former Residence. Medina, Ohio.

Former Occupation. School Teacher.

In giving the occupation of a person, it is not sufficient to state that he is a merchant, Clerk or Mechanic, but the particular branch of business employment, or the actual trade must be specified—examples—dry goods merchant, clerk in woolen mills, carpenter, or ship builder.

2. A. State to whom the proposed insurance is to be paid in case you live to its maturity? Himself.

B. Residence? Cleveland.

C. Postoffice address? Cleveland, Ohio.

D. To whom, in case you die previously? Electa L. Waters.

E. Residence? Cleveland, Ohio.

F. Postoffice address? Cleveland, Ohio.

G. In case any beneficiary dies before you, is that interest to go to the survivors, or is it to revert to yourself?

H. If no beneficiary survives you, is the policy to be paid to your estate, or to whom? His estate.

I. Has the beneficiary named herein an interest in your life to the full amount applied for, and if not, to what extent? Yes.

J. State the relationship of the beneficiary, or how the interest arises? My wife.

3. A. State the amount of insurance applied for? Five thousand ($5,000) dollars.

B. The kind of policy desired? Endowment at age 85 years.

C. Whether the premium is to be paid annually, semi-annually or quarterly? Annually.

162 4. Give the date and place of your birth, and age at nearest birthday. Year, 1835. Month, October. Day, 14. Town, Cambridge. County, State. England. Age, 46.

5. A. Are you insured in this Company? No.

B. If so, give the number and amount of each policy?

C. Have you ever been? No.

6. A. State the companies in which you are now insured, and the amount in each? Eatna, $2,000; Provident Life, $10,000.

B. Also those in which you have been? Mutual Benefit.

7. A. Are you engaged in manufacture or sale of intoxicating drinks? No.

B. Have you ever been so engaged? No.

C. State full particulars. Strictly a temperate man.

Dated at Cleveland, this 25th day of April, 1881.

Signature of person proposed for insurance. Signed, Alfred J. Waters. In presence of—signed, Warren S. Porter.

Form B. Questions to be asked by the Medical Examiner, and answered by the person whose life

is proposed for insurance, such answers to be written in by the Medical Examiner only, and at the time of examination.

1. A. Are you the same person described in question 1, form A, of this application? Yes.

B. Are your full name, residence and other particulars there mentioned, correctly answered and recorded? Yes.

C. Have you carefully read the answers given in Form A, and is the signature thereto your own proper signature? Yes.

D. Do you contemplate a change of residence, if so when, and to what place, and whether for purpose of business, health, or pleasure? No.

2. A. Have you made any proposal or opened negotiations with any person for insurance upon your life in any company upon which a policy
163 has not been issued? No.

B. Has any application for insurance upon your life ever been made to any Company upon which a policy has not been granted? No.

C. Give the name of each Company and the amount proposed in each.

D. Has any unfavorable opinion upon the insurableness of your life ever been given by a physician? No.

E. In either case state full particulars.

3. A. Are you now in good health? Yes.

B. Do you usually have good health? Yes.

4. A. Has your weight recently increased? No.

B. Or diminished? No.

C. To what extent and how rapidly?

5. Have you ever been subject to or had any of the following disorders or diseases? (Answer "Yes" or "No" to each.) When the answer is "yes" state all the particulars as to date, duration, etc., of the disease had, and in case this space is not sufficient, continue explanation on third page under head of "Blank for additional remarks by Medical Examiner." Had Small-pox about 34 years ago. Asthma? No. Bronchitis? No. Bilious, Renal or Hepatic Colic? No. Catarrh? No. Consumption? No. Chronic Diarrhœa? No. Cancer? No. Dizziness? No. Delirium Tremens? No. Chronic Discharge from the ear? No. Dyspepsia? No. Dysentery? No. Difficulty in swallowing? No. Difficulty of vision or hearing? No. Dropsy? No. Difficulty in urinating? No. Excessive or Scanty Secretion of Urine? No. Eruptions of the skin? No. Erysipelas? No. Fits or Convulsions? No. Fistula? No. Gravel? No. Headaches (frequent or severe)? No. Gout? No. Habitual Cough? No. Habitual Constipation? No. Hemorrhoids? No. Insanity? No. Jaundice? No, Loss of Consciousness? No. Lumps or Swellings of any kind? No. Neuralgia? No. Open Sores? No. Pleurisy? No. Pneumonia or Inflammation of the Lungs? No. Palpitation of Heart? No. 164 Paralysis? No. Articular Rheumatism? No. Sunstroke? No. Spitting or Coughing of Blood? No. Smallpox? Yes. Swelling of Hands, Feet or Eyelids? No. Suppurating Glands? No. Varicose Veins? No. Yellow Fever? No. Any disease of the Genital or Urinary Organs? No. * *

9. Have you ever had any illness not mentioned in questions No. 5, 6, 7 and 8? If so, state fully all the particulars? Typhoid Fever 12 years ago, and a cold a few weeks ago. * * *

12. A. When did you last consult a physician for any illness? 12 years ago.

B. What was that illness? Typhoid Fever.

C. Who was that physician? Dr. R. P. Brown, Cleveland, O.

D. Give name and residence of your usual medical adviser? Have none. * * *

15. Is there anything in your knowledge or belief in your physical condition, family or personal history or habits, tending to shorten your life, which is not distinctly set forth above? No.

I hereby declare that I have read the above questions, and written answers, and that the answers as written are correct and true, and I hereby for myself and for all others who may in any event have or claim any interest in the insurance hereby applied for, do request and authorize any physician or surgeon having any knowledge or information acquired professionally or otherwise, touching the matters herein referred to, mentioned or involved, to disclose the same fully at any time at the instance of said Company, hereby waiving any privilege connected therewith. And it is distinctly declared and agreed that all the statements and answers to the printed questions written upon Form A and B, which, together with this declaration and agreement, constitute an application to the Union Mutual Life Insurance Company of Maine for an

insurance of five thousand dollars upon the
165 life of Alfred J. Waters, are offered to the said Company as a consideration of the contract applied for, each of which statements and answers, whether written by his own hand or not, every person accepting or acquiring any interests in the policy hereby applied for adopts as his own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the company in reply to its inquiries, and upon which, should the insurance applied for be granted, the Company's contract will be founded. And this application is submitted to the said Company, with the following express covenants and agreements:

1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said Company and the first premium thereon actually paid, during the continuance of the life proposed for insurance, in the same condition of health as described in the application.

2. That if the insurance applied for be granted by the Company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy; and that in particular no insurance shall be claimed to be thereby granted against death by self-destruction; nor shall any insurance thereby granted remain in force after health shall have been impaired by narcotics or alcoholic stimulants, or after the insured shall, without the consent of the Company in writing signed by the President or Secretary, pass or remain

beyond the limits of residence and travel, or engage in any of the occupations or employments specified upon the Company's form of policy; and that the entire contract contained in the said policy and its application taken together shall be construed and interpreted as a whole, and in each of its parts and obligations according to the charter of the said Company and the laws of the State of Maine, the place of the contract being expressly agreed to be the home office of the said Company in the
166 City of Augusta, in the said State of Maine.

3. That in any distribution of surplus, the principles and methods which may be adopted by the Company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed. Dated at Cleveland, Ohio, this 10th day of June, 1881.

Signature of person proposed for insurance, Alfred J. Waters. In the presence of W. J. Sheppard, Medical Examiner. * * * I certify that the answers to the above questions and those in Form B. are in my own handwriting, and that I have made in private a physical examination of the person proposed for insurance. Dated at Cleveland, this 10th day of June, 1881. W. J. Sheppard, Medical Examiner.

Alteration of Policies: Changes in the manner of paying premiums (as from yearly to half-yearly, or quarterly, or the reverse) can only be made at

the end of a year, dating from the commencement of the policy; and when such a change is desired by a policy-holder, the policy must be forwarded to the Company for proper and requisite indorsement.

Premium Notices: No policy-holder must expect to be notified when his premium will be due. It is the practice of the Company to send these notices, as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception.

Restorations; The Company reserves the right to restore lapsed policies at its option. Applications for restorations of lapsed policies will not be considered unless made upon the printed forms furnished by the Company, nor unless fully completed and forwarded to them within ninety days from the date of lapse.

167 *Payment of Premiums:* All premiums are due at the office of the Company, in the City of Augusta, Maine, at the date named in the policy; but, at the pleasure of the Company, suitable persons may be authorized to receive such payments at other places, but only on the production of the Company's receipt therefor, signed by the President or Secretary; and no payment made to any person except in exchange for such receipt will be recognized by the Company, or be deemed by either party as valid payment. If, for any reason, a premium is received after it becomes due, it must in every case be understood by the parties as an act of courtesy on the part of the Company, and in no case whatever as constituting any obligation on its

part to waive the payment of a future premium when due. In case any note, check, or draft given towards the payment of any premium, shall not be paid at maturity, the policy lapses in the same manner as upon the non-payment of the premium when due. April, 1880. No. 73,549. Union Mutual Life Insurance Company, of Maine. 10–14, 35. 224.

Agents are requested not to fill the blanks on this page.

Date of payment, June 15th, 1881.

Age, 46. Sum assured, $5,000.

Plan, E, at 85—6-15. 1920.

Beneficiary. Himself p. d. to his wife Electa L. Waters if she survives him; if not, to his estate.

On life of Alfred J. Waters.

Town, Cleveland. County, Cuyahoga. State, Ohio.

Occupation, Fire Insurance Adjuster.

Date of application, 6, 10, 1881. Annual premium, $199.25.

Med. Exr., W. J. Sheppard. Agent, W. S. Porter At Cleveland, O.

Received 15th day of June, 1881.

Approved 16th day of June, 1881. Signed.

Thos. A. Foster, Medical Director.

Approved.

168 *EXHIBIT B.*

Union Mutual Life Insurance Company.

Cleveland, O., June 23, 1881.

Union Mutual Life Insurance Co.

Gentlemen:—A. J. Waters insured under pol.

3,549 for $5,000 has agreed to take $4,000 if you will issue on same application—to bear same date. Can't you send pol. to me to be delivered only when paid for—and such paper signed as you may require - you to send with pol.? Do so if consistent.

Yours Very Truly,

[Signed.] John O. Winship.

EXHIBIT D.

Agents Manual.

Union Mutual Life Insurance Company, of Maine.

Directors Office, 153 Tremont street, Boston.

Instructions to Agents.

1. The Union Mutual Life Insurance Company, of Maine, began business in 1849, with a guaranty capital of $100,000, which has since been repaid to the stockholders, and the capital stock cancelled. The Company is now purely mutual and the entire surplus earnings from its business, as well as its accumulation, are the property of its policy-holders exclusively, to whom all dividends are paid.

Application for insurance.

2. The issuing of a policy of life insurance is decided by the officers of the Company upon the written statements and representations contained in and indorsed upon the application thereof made to the Company. The application (including its written and printed contents, and the certificates accompanying it) together with the policy

169 itself, constitute the contract of insurance. The validity of the contract depends upon the truth

and accuracy of such written and printed statements taken together. All blank speces not filled by the written answers should be filled out by written lines, to avoid, among other things, the possibility of the assured claiming afterwards that additions or alterations were made by the agent, or by the officers, or by any other person. When erasures or alterations are made in the answers or statements of the applicant, they should be noted in writing on the application, and such noting signed in the same manner as before. The observance of these regulations adds to the protection of the parties, the agents and the company.

3. No one has any right to make any change in the application after it has been signed by the parties, except such parties; and they should note such changes over their signature as above indicated.

4. Too much care cannot be taken to have every question answered understandingly, distinctly, definitely and without equivocation or evasion; for an account of any variance between actual facts, and the facts as stated in writing in the application, although in what might seem an immaterial point, the insurance under the policy applied for becomes and is void and of no effect.

5. Applications made out on the blanks of other companies will not be accepted; they must be made out on the forms prescribed by this Company.

6. Agents will not submit applications to medical examiners or send them to the Company, when the amount of the first premium to be paid is less

than $10, as no policy for so small a premium will be issued; nor applications upon classes of risks which the Company does not insure; in all such cases the cost of medical examination will be charged to the agent.

170 7. As no policy will be issued until everything appertaining to the application is complete, the agent should carefully scrutinize each one before forwarding it to the company, and see that every question is answered, and particularly note, among other things, that the age (next birthday) and date of birth correspond.

8. A completed application, whether rejected or written upon, will not be allowed to leave the Company's office, as it forms a part of its records.

9. The ommission of a clear and satisfactory reply to any question in the application, or irregularity in making out the application will surely require an explanation, and the consequent delay may result in a loss of the risk.

10. Agents are particularly requested to return applications sent them for correction without unnessary delay.

11. The full name and full residence of the applicant should be stated with exactness, and the occupation with sufficient explicitness to enable the Company to judge whether the employment is permitted under the policy. The terms merchant, manufacturer, clerk, etc., are not sufficiently definite. The particular kind of each calling must be stated.

12. Should the life insured become impared, or

anything transpire, or information come to the knowledge of the agent, making the risk less desirable, after the application is taken, and before actual delivery of the policy to the assured personally, the agent must not deliver, but return the receipt and policy to the office, and notify the Company immediately.

BENEFICIARY CLAUSES.

13. Persons whose lives are insured generally suppose, that because they pay the premiums, they can control the policy without regard to those for whose benefit the insurance is written. But the courts have decided otherwise, and very often a man is greatly disappointed to find, after the
171 beneficiary named in the policy has died, that the policy really belongs to the heirs of such beneficiary, instead of to himself and his heirs.

14. In most cases the insurer will desire that the policy shall revert to himself, if the benificiary named in the policy dies before he does. If a policy is made for the benefit of a man's wife, and she dies childless, it goes to her heirs, in whom the husband may have no interest; but if the policy is written "for her benefit if she survives, otherwise to revert to him," and she dies, it belongs to him, and he can then give it to whom he pleases.

15. To prevent as far as possible the occurrence of these disappointments, and the difficulties arising from not understanding the legal effect of a written contract, the second question of the application now used has been revised so as to bring out

the exact intentions of the insurers as to the disposition to be made of their policies.

16. Agents should be very particular in explaining this matter to applicants.

ALTERATIONS AND CHANGES.

17. Changes of every kind should be discouraged, and when made must be without cost to the Company, and only at its option.

18. When a policy is to be changed, the receipt in the hands of the agent for collection (if there be any, and if it is affected by the change) must be sent back with the policy.

19. Requests for change must be made out on the blank forms furnished by the Company, and must be signed by all the parties in interest.

20. Changes affecting the premiums can only be made upon the anniversary due date of the policy.

21. A new examination will be required if the new policy embraces an increase of risk, which may be because of the larger amount, or the lengthened
171 term of the policy, or an increase in the number of annual premiums required to be paid on such proposed new policy; in which case the new examination must be approved by the Company, before the increased risk can be taken.

MEDICAL EXAMINATIONS.

22. Examinations are to be made only by the duly appointed examiners of the Company.

23. When an agent contemplates soliciting in any new field, he should at once write to the Company, for the

name of the medical examiners to be employed. The agent should not wait until he has a party to be examined before attending to this, as the proper selection of the examiner often requires a week or more; and as this rule is inflexible too much importance cannot be given to attending to the appointment promptly.

24. Agents must not write direct to the medical supervisors, or make any suggestions to them regarding their appointments.

25. No time will be saved by having examinations made by examiners unknown to the Company, as they will not be accepted, and the fee will have to be paid by the agent employing them.

26. The usual fee allowed by the Company to be paid for each examination is from $2.00 to $3.00. Fees of the medical examiner will be paid, whether the applicant be accepted or rejected, provided the application has been received by the Company.

27. The causes for rejecting applicants will not be disclosed, as they are in a measure confidentially communicated.

28. Bills for examinations should be made out monthly and mailed by the examiner direct to the Company for payment. Agents are requested to instruct the examiner to this effect, and furnish him with the bill heads supplied by the Company, but in no case to pay such
182 bills.

29. All applications upon which an examination has been made, whether otherwise completed or not, must be sent to the Company, whether rejected by the local medical examiner or not, as a check upon the correctness of the examiner's bills when presented.

30. The Company should not be subject to the expense

of a medical examination, where the personal family history of the applicant would render his rejection probable.

31. Every applicant must be examined by the examiner appointed for the place where the applicant resides; otherwise the agent will have to pay the medical fee, and the applicant be re-examined.

32. If, however, an application is taken at a considerable distance from the applicant's usual place of residence, an exception to this rule may sometimes be made, but only when clear and satisfactory evidence is furnished to the Company that the applicant could not be examined by the regular examiner of this Company at the proper place; which evidence should in all cases be furnished at the time of forwarding the application.

Policies will be issued only on sound lives between the ages of 18 and 65.

33. Applicants under 25 years of age will be rated at 25, and will not be insured for amounts exceeding $5,000.

34. Persons between the ages of 25 and 65 will not be insured for amounts exceeding $10.00.

35. Policies will not be issued when the first premium to be paid is less that $10,000.

FORM OF POLICY.

36. The Union Mutual Life Insurance Company issues only one general form of policy; viz, a policy payable at death, or at the end of a term of years, if the party whose life is insured is then living. The terms for which insurance is granted are ten, fifteen, twenty,
173 twenty five, thirty, thirty-five, forty, forty-five and fifty years from the date of the policy, not however to extend beyond age 85. The premiums on thees

policies are payable annually, semiannually, or quarterly during the whole term of insurance.

37. Instead of the old form of life-policy, which was payable at death only, this Company issues a policy payable at death or at age 85, if the party insured is then living. Premiums on these policies are payable annnually, semiannually, or quarterly, during the whole term of the insurance, or for ten, fifteen or twenty years from the date of issue.

38. All policies issued contain a definite agreement on the second and third pages, plainly stating their value in case payments are discontinued after the third year, and are governed by the Maine Non-forfeiture Law, and the modified agreement made by the Company and printed in the policy.

39. Policies will not be issued, in any event on proprietors of hotels, keepers or attendants of restaurants, and bar and saloon keepers, or persons engaged in the manufacture of liquors, ale, &c.

40. "Limits of travel and residence 'and' the occupations and employments, engagement in which will release the Company from all liability under the contract may be found on the policy form marked 'One' with the heading "Provisions and requirements referred to in this policy."

PAYMENT OF PREMIUMS.

41. Premiums may be paid annually, semiannually, or quarterly; provided the amount paid is not less than $10.

Agents should always endeavor, however to have them paid annually. No note, due-bill, or any other thing than money, postoffice order, or check good at bank, will be received by the Company for premiums.

42. Agents must not receive any past due premium unless the party insured is, at the time of payment, in good health, and of sober, correct and temperate
174 habits. If the premium is past due less than thirty days, the party's own certificate, or that of the owner of the policy, must be taken on Form No. 204; and the agent will not accept the premium, nor deliver the renewal receipt, unless the certificate, properly signed is received by him.

43. If the premium is past due more than thirty days, a new medical examination will be required, at the expense of the Company's examiner on Form No. 129, which must be forwarded to the Company for its approval; and the agent will not deliver the renewal receipt until he has been notified that said medical examination is satisfactory, and that the Company has authorized a restoration of the policy.

44. If the past due premium is tendered personally or by mail within sixty (60) days after the due date, the agent may receive and hold the same, but only on certificate Form No. 205 subject to the instructions required in Sect. 43.

45. If, for any reason, any premium, or premiums, are received after the same became due, such receipt shall not be construed as a waiver in any wise of any of the provisions of the application and declaration, the policy, or any premium receipt. And such receipt of premium after the same has become due, is to be and shall be upon the condition that the holder of the policy expressly stipulates and agrees that the party whose life is thereby insured is at the time in good health, and of correct, sober and temperate habits at the time of such receipt, and that, if the fact is otherwise, the policy shall not be put in force

by such payment. The agent is not authorized to deliver the receipt if the fact is otherwise.

46. Should this Company upon any occasion consent to renew or revive a policy by the acceptance of premium after the same is due and payable, such acceptance, or any number of such acceptances, whether consecutive or otherwise, in every such case is to be, and shall
175 always be, viewed and understood by the parties in interest as an independent act of grace and courtesy of the Company, and in no case in any wise to be considered as creating any obligation or precedent for waiving, or as a waiver of, any forfeiture or any conditions in the policy in regard to any future non-payment of premium on the day it falls due, and is payable as therein expressly provided.

47. If any applicant desires to make payment of premium at the time of making application, the agent may give a receipt therefor on the form known as "Conditional Receipt." furnished for such purpose by the Company, and signed by the President and no other, a duplicate of which must be forwarded to the Company by the applicant. The agent is not authorized to give any other receipt.

EXTRA PREMIUMS.

48. These must always be paid in advance; they do not participate in the profits of the Company, and have no surrender value, or return in the case of the extra hazard ceasing within the term for which they are granted.

49. Brakemen or firemen on railroads or steamboats, freight conductors and railway switchmen and yard masters will be charged $5 extra per $1,000 of insurance.

50. Colored persons will not be insured except for short endowments.

51. The rates for other extra risks than herein mentioned, and for foreign residence outside the limits prescribed in the policy, may be had on application to the Company.

RISKS ON WOMEN.

52. $2,500 is the largest amount taken upon any woman.

53. Unmarried women, and married women who have never had any children, will not be insured until they are over 48 years of age.

54. An extra premium of $5 per $1,000 will be charged on all women insured until they reach the age of 48
176 years.

55. Policies on the lives of married women will only be issued in favor of their children, except when the applicant has an actual moneyed interest in the proposed life.

DIVIDENDS.

56. The divisible surplus of the Company is apportioned, on the Contribution Plan, according to such equitable rule or such rate of apportionment as may from time to time, and at any time, be determined upon by the Directors of the Company.

57. On policies issued prior to May 15, 1879, dividends declared are payable upon the third and each subsequent annual payment of premium, and will be accredited to the policy, and be payable in reduction of the next premium due.

58. Policies issued on and after May 15, 1879, shall be entitled, during their continuance by the payment of premiums, to participate in the apportionment of the surplus of the Company according to the principles and methods adopted by the Company for such apportionment as follows:

1. The dividends thereon will be paid by reversionary additions to the amount insured.

2. When payment of premiums is discontinued after the third year, and before the tenth year, the present value of said dividend, additions at actuaries' rate of mortality, with interest at four per centum per annum, will be added to the value allowed for the policy, and the sum applied to continue in force the amount originally insured, according to the provisions of the Maine Non forfeiture Law and the policy.

3. But after premiums have been paid ten years, in case of failure to pay any subsequent premium when due, the Company will pay the same out of the present value of any additions to the policy computed as afore-
177 said, until the value of the additions is reduced to an amount less than the premium then due. The effect of such payment will be in all respects as though such premiums were actually paid in cash, giving the same right to dividends; and the holder of the policy will have the right, at any time during the continuance thereof, by such application of dividends, to resume the payment of premiums in cash, without being subjected to further medical examination.

4. When payment of premiums is discontinued after the tenth year, and after the present value of the additions has been exhausted by the payment of premiums to the extent as above provided, the present value of any re-

maining addition, less than the premium then due, will be added to the value allowed for the policy, and the sum applied, to continue in force the amount originally insured, according to the provisions of the Maine Non-forfeiture Law and the policy.

59. In the settlement of all policies that become claims, all unpaid dividends then standing to the credit of the policy will also be paid.

60. On Premium Note Policies the dividends will be applied to the reduction of the premium note until the same is fully paid. Thereafter the dividends will be applied, as in other all cash premium policies, according to the rules of the Company, or the express provisions in the policy.

61 The profits of a life-insurance company cannot be foretold; and no officer, agent or other person is authorized to state what the future dividends or addition to policies will be.

RESTORATIONS AND ASSIGNMENTS.

62. The Company reserves the right to restore lapsed policies at option.

63. Applications for restorations of lapsed pol-
178 icies will not be considered unless made upon the printed forms furnished by the Company.

64. In every case the fee for the new medical examinations required to restore a policy must be previously paid by the applicant, and the receipted bill forwarded with the application for restoration.

65. This Company will not take notice of any assignment of this Policy, until a duplicate thereof shall be delivered to the Company; and under no circumstances

will the Company assume any responsibility for the validity of such assignment. If any claim be made under an assignment, proof of interest to the extent of the claim will be required.

PROOFS OF DEATH.

66. Must be made upon blanks furnished by the Company, the information required therein must be given.

67. Agents are not authorized to make any statement on behalf of the Company, with reference to proofs of loss, as to their being complete, sufficient, or satisfactory; not to bind the Company in any manner by their acceptance. They are only authorized to forward proofs of loss to the Company on behalf of the beneficiaries when requested by them to do so, to be submitted for approval to the proper committee.

68. When the proofs are completed the agent should look them over carefully, and see that every blank is filled and all the questions answered definitely, and also that the instructions upon the back of the proofs have been fully complied with.

69. Approved claims are payable in three months after the receipt of the proofs of death.

AUTHORITY OF AGENTS.

70. No premium receipt is to be delivered until the premium has actually been paid during the lifetime of the life insured, and while the policy is otherwise in force; nor if the date mentioned and fixed in the policy
179 for payment of premium has passed, unless the insured life is in sound health, and of correct, sober, and temperate habits.

71. Agents are not to make any changes whatsoever in forms of application for insurance, or in policies or receipts for premiums, or to waive forfeiture or any condition of the application or of a policy or premium receipt, name an extra special risk, issue permits of any kind, or bind the Company in any way; they being permitted simply to solicit applications for insurance, and to make manual delivery of policies and premium receipts to the assured, under the rules and instructions of the Company. And no information, statement or representation at any time, or from time to time, given or made by the assured or iusured to any such agent, or to either of them by him, or to the assured by any other person unless such information, statement or representation be reduced to writing, and promptly presented by the assured to the President of the Company—will be deemed notice to the Company, or will effect its right to treat the same as never given or made.

72. Agents have no authority to agree that the insurance shall hold good, otherwise than by the actual payment of the premiums when due, by and according to the terms of the policy, nor to give credit on account of the Company.

73. Agents are not authorized to receive any premium on behalf of the Company unless they shall have been furnished a receipt therefor, signed by the President, Secretary or Assistant Secretary, and it is actually in their hands for delivery, and then only in accordance with the express terms thereof.

74. Agents have no authority to waive or postpone payments of premiums, to waive forfeitures, or make, alter or discharge any contracts on behalf of the Com

pany, or to change, modify, alter, or waive the

conditions expressed upon any policy, application or receipt, or other document of this Company.

75. Agents are not authorized to make the Company liable for any expenditures whatever; and no charges for advertisements, printing, stationery or other expenses will be allowed, unless special permission is obtained in writing in each and every case.

AGENT'S REPORT.

76. Reports must be made monthly, or whenever called for, and only upon the blank or statement made up at the Company's office and sent to the agent for completion, according to the instructions printed on the back of each report.

77. The monthly report must be returned to the Company within five days after its receipt by the agent, whether any collections have been made or not.

78. Policies undelivered and ninety days past due, and renewal receipts and permits sixty days past due, and not paid for, must be returned with the report and no deviation will be overlooked. This affords ample time for making collections, provided the parties are in good health and of correct, sober and temperate habits.

79. A proper voucher must accompany the report for every charge made, excepting the commissions due the agent making the report.

80. The agent should sign his report at the botton in person, as evidence of its correctness.

GENERAL INSTRUCTIONS.

81. While acting as agent for this Company, you are not permitted to act in the same capacity for any other.

82. All publications, of whatever nature, gotten up by an agent must receive the sanction of the President or Board of Directors, and none shall be circulated for the Company until first so approved.

181 83. All communications pertaining to the business of the Company should be addressed to the Union Mutual Life Insurance Company, and not to an individual officer or employee, either officially or personally. Correspondents from agents not reporting direct to the Company's office, must be addressed to the Company's agents through whom they report; and all applications, inquiries, requests for permits, receipts, etc., must be transmitted through such agents.

84. All errors or omissions in policies or renewals must be corrected at the office of the Company.

85. Agents who report and remit the cash for payments not actually received by them, do so at their own personal risk, as it will not be returned by the Company.

86. All moneys received by agents on account of this Company, are the property of the Company held in trust by such agents, and are not to be used by them for any purpose not designated by the Company. Such use is a criminal offence with severe penalties.

87. The business policy of this Company is to prosecute its own business without interfering with any other company's, such as by inducing their members to become dissatisfied, to lapse their policies, and take insurance in this Company. Such efforts are not only reprehensible in themselves, but usually result in damage to the party whose application it is sought to obtain by disparaging the Company in which he is insured. Applications are not often secured by agents who practice this method of solicitation, and when obtained the persons insured are of

those easy dissatisfied by subsequent misrepresentations of other agents, or their own imaginations.

89. Your are, therefore, instructed and directed, in working for your own Company, not to work against some other one by trying to induce policy-holders or
182 agents of other companies to leave them; and, no matter what sound reason for distrust or dislike you may have against any other Company, such policy-holders or agents of other companies are entitled to their own opinions, and to be let severely alone by you, even if by your silence you think they are damaging their own interests.

90. Never be discouraged by the number of agents in your district. Recollect the greater part do nothing, and that, if there are several actively at work, they will have enough to do without wasting time in interfering with you; and that the more actively you and they work—you for your Company and they for theirs—the more the subject of Life Insurance will be understood; the more the field is worked the greater the success of all. People must be educated to Life Insurance just as they have been to Fire Insurance; so that every prudent man will voluntarily come to an agent and apply to insurance on his life, just as he now would for insurance on his property against fire. As it is, the masses seem to think loss by fire to be more certain than loss (often irreparable loss too) occasioned by death.

91. Never, for a moment, consider it beneath your dignity to press or ask for a life proposal. Bear in mind that you are doing a man a real good, and one for which he will never in the future reproach you. "Among the honorable workers in the civilized world to whom the public as well as the assured will be indebted, we give faithful

and successful life insurance agents a high place, and no field that we know of is more inviting to an ambition that would devote the best of talent to the benefit of society at large and individuals in particular."

92. The foregoing instructions are of a private nature between the Company and its agents, and are not intended for the use of the public. No instructions
183 or rules in this book shall be construed to vary the policy, application or receipts issued by the Company, and in case of anything contradictory between them and this manual, the former shall govern.

93. This manual supersedes the instructions given in all former manuals, and it shall be void after any subsequent manual shall have been issued by this Company, or after it shall have been otherwise recalled.

JOHN E. DE WITT WHITE,
May 1, 1879. President.

EXHIBIT "C."

12. Should the life insured become impaired, or anything transpire, or information come to the knowledge of the agent, making the risk less desirable, *after the application is taken, and before actual delivery of the policy* to the assured personally, the agent must not deliver, but return the receipt and policy to the office, and notify the company immediately.

70. No premium receipt is to be delivered until the premium has actually been paid during the life time of the life insured, and while the policy is otherwise in force; nor if the date mentioned and fixed in the policy for payment of premium has passed, *unless the insured life is in sound health*, and of correct, sober and temperate habits.

71. Agents are not to make any change whatsoever in

forms of application for insurance, or in policies or receipts for premiums, or to waive forfeiture or any condition of the application, or of a policy or premium receipt, name an extra for special risks, issue permits of any kind, or bind the Company in any way, they being permitted simply to solicit applications for insurance, and to make manual delivery of policies and premium
184 receipts to the assured, under the rules and instructions of the Company. And no information, statement or representation at any time, or from time to time, given or made by the assured or insured to any such agent, or to either of them by him, or to the assured by any other person, *unless such information, statement or representation be reduced to writing, and promptly presented by the assured to the President of the Company*, will be deemed notice to the Company, or will effect its right to treat the same as never given or made.

72. Agents have no authority to agree that the insurance shall hold good, otherwise than by the actual payment of the premiums when due, by and according to the terms of the policy, nor to give credit on account of the Company.

73. Agents are not authorized to receive any premiums on behalf of the Company, unless they shall have been furnished a receipt therefor, signed by the President, Secretary or Assistant Secretary, *and it is actually in their hands for delivery*, and then only in accordance with the express terms thereof.

74. Agents have no authority to waive or postpone payments of premiums, to waive forfeitures, or make, alter, or discharge any contracts on behalf of the Company, or to change, modify, alter, or waive the conditions

expressed upon any policy, application, or receipt, or other document of this Company.

75. Agents are not authorized to make the Company liable for any expenditures whatever; and no charges for advertisements, printing, stationery, or other expenses, will be allowed, unless special permission is obtained in writing in each and every case.

185 *EXHIBIT.*

Charter of the Union Mutual Life Insurance Company.

State of Maine, Office of Secretary of State:

I hereby certify that the pamphlet to which this is attached is a true copy of the Charter of the Union Mutual Life Insurance Company, approved February 19, 1878.

{Seal.}

In Testimony whereof I have caused the seal of the State to be hereunto affixed.

Given under my hand at Augusta, this 15th day of February, in the year of our Lord one thousand eight hundred and eighty-two, and in the 106th year of the Independence of the United States of America.

JOSEPH O. SMITH,
Secretary of State.

Charter of the Union Mutual Life Insurance Company.

Be it enacted by the Senate and House of Representatives in Legislature assembled as follows:

The various acts which constitute the charter of the Union Mutual Life Insurance Company are hereby con-

solidated and amended so that the following shall be the charter of said Company:

* * * * * *

Section 3. Every person whose life shall be insured in this Company, according to the provisions of this act, shall be deemed a member thereof during the period of such insurance, and until the policy shall be paid, cancelled, or surrendered, according to the terms of this act and the by-laws of the Company, and no longer; and shall be entitled to one vote, and to an additional vote for each thousand dollars of insurance above one thousand.

And any member may vote by proxy, if the same
186 be given directly to the person producing it at any meeting, but no person or corporation shall have the right to vote on any policy of re-insurance issued by this Company.

* * * * * *

Deposition of witnesses taken in a cause pending in the U. S. Circuit Court, Northern District of Ohio, E. Division, wherein Electa L. Waters is plaintiff and the Union Mutual Life Insurance Company, of Maine, defendant, and for said defendant, in pursuance of the notice hereto attached.

J. H. Drummond, Counsel for the defendant Company, was present.

DEPOSITION OF NICHOLAS DeGROOT.

Nicholas DeGroot, of the County of Cumberland, of lawful age, being first duly sworn by me, as hereinafter certified, deposes and says:

Q. 1. What is your name, age and residence?

A. Nicholas DeGroot; forty-two years; Portland.

Q. 2. What is your occupation?

A. Assistant Secretary of the Union Mutual Life Insurance Company.

Q. 3. How long have you held the office, and who was your predecessor?

A. Since September 13th, A. D., 1881, Henry D. Smith was my predecessor. (The deposition not being completed, adjourned to Monday, May 7th, 1883, nine o'clock A, M.)

Monday, May 7th, 1883. Met according to adjournment.

Drummond & Drummond, Counsel for defendant, present.

Q. 4. Will you attach to your deposition a copy of the form of the cash notes of the Company?

A. Yes. The form herewith attached marked Exhibit A. bt. V. C. Magistrate."

Q. 5. Will you attach to you deposition a copy of the form of the premium notes of the Company?

A. Yes, the form herewith attached marked Exhibit B. bt. V. C. Magistrate."

187 Q. 6. State whether or not at the time of the application of Alfred J. Waters, upon which were issued policies 73549, for the sum of $5,000, and 73621 for the sum of $4,000, these notes annexed were used by the Company?

A. The cash notes (Exhibit A.) were not used at that time. The premium notes (Exhibit B.) were used for past premiums on old contracts, but were not used for any new policies issued by the Company at that time.

Q. 7. State whether or not at the time of the issue of the said Waters' policies any "premiums" or "cash" notes were receivable by the Company?

A. No, except as to old contracts as stated in answer to "Question 6."

NICHOLAS DEGROOT,
Exhibit A. bt. V. C., Magistrate.
Cash Note, No.— Form 25-E.

$ 187...

For value received I promise to pay to the Union Mutual Life Insurance Company..... 000 Dollars, in ..... months, without grace (waiving notice) with interest at seven per cent. This is given instead of cash, in part payment of the annual premium on policy No..... issued by said Company, and by them so accepted, on the express condition that all claims to further insurance and all benefits whatever which full payment in cash of said annual premiums would have secured, shall become immediately void, and forfeit to said Company, if this note is not paid at maturity.

(This is the only form of cash note accepted by the Company. When it is taken for a policy numbered higher than 35,000 (and only then) the words "with interest at seven per cent." must be erased—as on all so numbered interest will be collected in advance.)

EXHIBIT B. VT. V. C. MAGISTRATE.

188 $ AUGUSTA, ME., ...18..

Twelve months after date, for value received, I promise to pay.....dollars to the Union Mutual Life Insurance Company, at their office, in this city, with interest annually, at six per cent., until paid.

And it is an express condition of the acceptance of this Note by said Company in part payment of the annual premium for Policy No.....(which condition is fully

agreed to by the Assured and the Promisor herein) that such acceptance shall in no wise affect the condition in said Policy, that the non-payment of any other portion of said annual premium, or the non-payment of the annual interest hereon when due, shall, in either case, cause the immediate forfeiture of said Policy.

(Premium Note No.....Form 21, J. 6.)

(Fractions of dollars must be included in Cash part of payment. No cents to be put into this Note.)

DEPOSITION OF HENRY D. SMITH.

Also *Henry D. Smith*, of Cumberland county, of lawful age, being first duly sworn by me as hereinafter certified, deposes and says:

1 Q. State your name, residence, age and occupation.

A. Henry D. Smith, Portland, Maine, thirty-three, Secretary of the Union Mutual Life Insurance Company.

2 Q. State how long you have been Secretary of said Company, and your occupation before that time?

A. I was appointed Secretary September 13th, A. D. 1881. I had been connected with said Company for about seventeen years previous to A. D. 1881. Was Clerk until about January, A. D. 1877, when I was appointed Assissant Secretary of the said Company, which position I held until I was appointed Secretary.

3 Q. State what application, if any, was made to the said Company by Alfred J. Waters, and what poli-
189 cies, if any, were issued by said Company on the life of said Waters?

A. We received an application on life of Alfred J. Waters, and issued policies numbered 73,549 on his life, dated June 16th, A. D. 1881, in the amount of $5,000,

and numbered 73,621 on his life, dated June 30th, A. D. 1881, in the amount of $4,000.

4 Q. State whether or not said Company received any other application upon which these policies, or either of them, were issued?

A. No. Both policies were issued on the application referred to in my answer to Q. 3.

5 Q. State whether or not, from your position in said Company, and the duties of your office, you would have knowledge if any other application was made to said Company by said Waters, or if these policies, or either of them, were issued upon any other application than the one referred to in "Q. 3" and answer to the same?

A. Yes, I should have such knowledge.

6 Q. State what knowledge you would have of any other application on the life of said Waters, or if these policies, or either of them, were issued on any other application than the one referred to in the answer to "Q. 3?'

A. From my position in the Company I would have knowledge of any other application on the life of said Waters, if any had been made, and I would know if these policies, or either of them, were issued on any other application than the one referred to.

7 Q. State whether or not, at the time of the application of said Waters, Warren S. Porter was an agent of the said Company ?

A. Yes. He was appointed agent about July, A. D. 1880, and ceased to be agent in the early part of A. D. 1882.

8 Q. State orally what were the powers of Mr.
190 Porter as an agent of the Company in relation to delivering policies and receiving premiums?

A. Should the life insured become impaired, or anything transpire or information come to the knowledge of the agent, making the risk less desirable after the application is taken, and before actual deliever of the policy to the assured personally, the agent must not delivery but return the receipt and policy to the office, and notify the Company immediately. No premium receipt is to be delivered until the premium has actually been paid during the lifetime of the life insured, and while the policy is otherwise in force; nor of the date mentioned and fixed in the policy for payment of premium has passed, unless the insured life is in sound health, and of correct, sober and temperate habits. Agents are not to make any change whatsoever in forms of application for insurance, or in policies or receipts for premiums, or to waive forfeiture of any condition of the application or of a policy or premium receipts, name an extra rate for special risks, issue permits of any kind, or limit the Company in any way; they being permitted simply to solicit applications for insurance, and to make manual delivery of policies and premium receipts to the insured, under the rules and instructions of the Company. And no information, statement, or representation at any time, or from time to time, given or made by the assured or insured, to any such agent or to either of them by him, or to the assured by any other person, unless such information, statement, or representation be reduced to writing, and promptly presented by the assured to the President of the Company will be deemed notice to the Company, or will affect its right to treat the same as never given or made. Agents have no authority to agree that the insurance shall hold good otherwise than by the actual payment of the premiums when due, by and according to the terms of

191 the policy, nor to give credit on account of the Company. Agents are not authorized to receive any premium on behalf of the Company, unless they shall have been furnished a receipt therefor, signed by the President, Secretary, or Assistant Secretary, and it is actually in their hands for delivery, and then only in accordance with the express terms thereof. Agents have no authority to waive or postpone payments of premiums, to waive forfeitures, or make, alter or discharge any contracts on behalf of the Company, or to change, modify, alter or waive the conditions expressed upon any policy, application or receipt, or other document of this Company.

9 Q. What other authority, if any, had said Porter in relation to delivering policies and receiving premiums on the same than what you have already stated?

A. None other except his contract with the Company dated July 15th, A. D. 1880.

10 Q. What authority, if any, had said Porter to deliver said policies to said Waters without payment of the premiums?

A. No authority whatever.

11 Q. What authority, if any, had said Porter to take notes from said Waters in payment of premiums on said policies?

A. None whatever.

12 Q. What knowledge, if any, had the said Company that said Porter did take notes from said Waters in payment of premiums on said polices?

A. The Company had no knowledge prior to the death of said Waters that any note or notes had been given or taken on said policies.

13 Q. What knowledge, if any, had said Company

that said Porter took notes in payment of premiums on any new policy prior to the death of said Waters?

192 A. I do not know of any such case.

14 Q. When, if at any time, did the Company first have knowledge that the said policies on the life of said Waters had gone out of Porter's hands?

A. No knowledge whatever until after the death of said Waters.

15 Q. What knowledge, if any, had the said Company that the said Porter delivered any policy on credit, or gave credit on any policy prior to the death of said Waters?

A. I do not know of any such case.

16 Q. Did the Company, at any time, consent or assent to, or affirm in any way, said Porter's act in delivering said policies upon credit, or in taking rates in payment of premiums upon said policies?

A. No.

17 Q. Upon what application, if any, was the policy numbered 73621 on the life of said Waters, dated June 30th, 1881, in the amount $4,000 written?

A. Upon the same application upon which was written policy number 73549, dated June 16th, A. D., 1881, for $5,000 on the life of said Waters.

HENRY D. SMITH.

I, Fred V. Chase, Notary Public for the County of Cumberland, State of Maine, do hereby certify that the above named Nicholas DeGroot and Henry D. Smith were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the above entitled cause, and that the foregoing depositions, by them respectively subscribed, were reduced to writing by me and subscribed by the said witnesses in my presence, and were commenced at the time and place in the notice specified,

and continued by adjournment from day to day at the same place and between the same hours as in the notice specified, and for the reasons above stated.

193 In testimony whereof, I have hereunto set my hand and official seal, this 7th day of May, A. D., 1883.

FRED V. CHASE, Notary Public.

{ Seal. }

State of Maine, }
Cumberland County, } ss.

Depositions of witnesses taken in a cause pending in the United States Circuit Court for the Northern District of Ohio, Eastern Division, wherein Electa L. Waters is plaintiff, and the Union Mutual Life Insurance Company is defendant, and for said defendant, in pursuance of the notice hereto attached.

DEPOSITION OF N. DeGROOT.

I, *Nicholas DeGroot*, of Portland, in the County of Cumberland, and State of Maine, of lawful age, on oath depose and testify in answer to interrogatories propounded by J. H. Drummond, Jr., of Counsel for defendant.

1 Int. What is your name?

A. Nicholas DeGroot.

2 Int. What is your residence?

A. Portland, Maine.

3 Int. Are you connected with the Union Mutual Life Insurance Company, of Maine? If so, in what capacity? How long have you been connected with it in that capacity? and how long in all?

A. I am connected with that Company as Assistant

Secretary since October, A. D., 1881, and as Cashier from March 1st, 1877 until October, 1881.

4 Int. Was Warren S. Porter, of Cleveland, Ohio, doing any business for that Company in 1881? If yes, what kind of business and in what capacity?

A. Yes. Getting applications for insurance, and collecting renewals in his territory, as agent of the Company.

5 Int. What was his authority in relation to the
194 delivery of policies upon applications taken by him?

(Objected to as immaterial.)

A. Upon receipt of policies he was only to deliver the same after receiving the premiums in cash.

6 Int. Was the time within which he was authorized to deliver such policies limited? and if so, to what time? State fully.

(Objected to as immaterial.)

A. Yes, the agent was limited to ninety days in the collection of premiums on new policies. If not paid within the ninety days the policies are returned to the Company for cancellation. During the ninety days the policies are not to be given up to the party unless the agent is satisfied that the health of the insured has not been impaired since the examination by the medical examiner of the Company.

7 Int. Was Porter authorized to take notes in payment of premiums?

(Objected to as immaterial.)

A. He was not.

8 Int. Was he ever authorized to take a note for premium in any one case?

(Objected to as immaterial.)

A. He was not.

9 Int. Did you, previous to the 1st of September, 1881, have any knowledge or information that Porter had ever taken notes in payment of premiums in any case?

A. No.

10 Int. So far as you have knowledge, was any such information before that time ever communicated to the Company, or to any officer of the Company, at its principal office?

A. No.

11 Int. Have you personally, or under your direction, had the correspondence of the Company examined upon this point?

A. Yes, I have under my direction.

12 Int. Who is Secretary of the Company?

A. Henry D. Smith.

13 Int. Who has performed the duties of Secretary since October 1st, 1882, and why?

(Objected to as immaterial.)

195 A. I have performed the duties of Secretary in consequence of the absence of Mr. Smith in the South on account of his health.

14 Int. What officer of the Company has charge of the correspondence with the agents in regard to policies?

A. The Secretary.

15 Int Has the practice ever prevailed with this Company of taking premium notes in payment, or part payment of the first premium?

(Objected to as immaterial.)

A. Premium notes were taken for premiums on policies issued prior to February 1st, 1877.

16 Int. How has it been with policies issued since then?

(Objected to as immaterial.)

A. Premiums are to be paid in cash.

17 Int. How is it with premiums accruing after February 1st, 1877, on policies issued before that date and still outstanding?

(Same objection as above.)

A. Premium notes are taken on the policies only when an agreement has been made to that effect; all premiums on other policies are to be paid in cash.

18 Int. Have notes in any other cases been taken for premiums, and if so, by whose authority, and where?

(Same objection.)

A. Yes, only on the authority of the President at the home office of the Company.

19 Int. Was a policy on the life of Alfred J. Waters written and sent to said Porter? If so, about when?

A. Yes; two policies, number 73,549 for five thousand dollars, and number 73,621 for four thousand dollars, were sent to Mr. Porter about the 15th day of June, 1881.

20 Int. When was the first knowledge received by the Company that these policies, or either of them, were out of Porter's hands?

(Same objection.)

A. About the seventh of September, 1881.

21 Int. Did you have previous to that date any
196 knowledge that Porter had ever delivered any policy without actual payment of the premium?

Same objection. A. No.

22 Int. Were you in the office generally from June 15th to September 15th, 1881?

A. I was.

In answer to the interrogatories propounded by William K. Neal of Counsel for plaintiff, I depose as follows:

23 Int. When was the examination spoken of in your

answer to the 11th Interrogatory made, as stated in your answer, and by whom?

A. I had it made about the 19th of January, 1883, by J. Frank Lang acting Assistant Secretary of the Company.

24 Int. Have you any personal knowledge as to the thoroughness of his search?

A. Yes. I saw him making the search at the office in the afternoon, and then he took them home to make a *further* search in the evening.

25 Int. Is this all the knowledge you have respecting this matter from personal observation?

A. Yes, as to the matter of searching.

26 Int. Can you give the dates of policies, number 73,549 and 73,621?

A. June 15th, as near as I can tell, both bore the same date.

27 Int. At whose request were they filled and forwarded to Mr. Porter, if you know?

A. At Mr. Porter's request.

28 Int. Have either of them ever been returned to the home office for any purpose?

A. Not to my knowledge.

29 Int. From the position which you occupied in the Company would you be likely to know if they had been so returned?

A. From June 15th, 1881, to October, 1882, I should not, since that time I should.

30 Int. Is Warren S. Porter still an agent of your Company? If not when did he cease to be such agent?

A. He is not. I have no personal knowledge when he ceased to be, but can tell by examining the books of the Company.

31 Int. Please state whether or not all information you have respecting this matter has been obtained from the records of the Company?

197

A. It has.

NICHOLAS DE GROOT.

State of Maine, Cumberland County, } ss.

I, H. R. Virgin, Notary Public, do hereby certify that the above named Nicholas De Groot, personally appeared before me, and was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, relating to the cause or matter for which his deposition was to be taken; and that the foregoing deposition by him subscribed was reduced to writing by me, and subscribed by him in my presence; and was commenced at the time and place in the notice hereto annexed, and, continued by adjournment from day to day at the same place, and between the same hours, as in the notice specified, by agreement of counsel. The cause of taking said deposition is that the deponent resides at a greater distance than one hundred miles from the place of trial.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 12th day of February, A. D. 1883.

N. R. VIRGIN, Notary Public.

{Seal.}

This is all the testimony in the case.

The Court thereupon proceeded to charge the jury as follows, to-wit:—

CHARGE.

In the United States Circuit Court.
198 For the Northern District of Ohio, Eastern Division.
May Term A. D. 1884. Martin Welker, Judge.

Electa L. Waters,
vs.
The Union Mutual Life Insurance Company. } Charge of the Court.

Gentlemen: This suit is brought by the plaintiff on two policies of insurance, one bearing date the 16th of June, 1881, for five thousand dollars, and one for the sum of four thousand dollars, bearing date the 30th day of June, 1881, on the life of the husband of the plaintiff; and issued for her benefit in consideration of the payment to the Company, the defendant, of a stated sum in each policy, and the payment of a like sum yearly thereafter during the continuance of the policies.

It is alleged that Alfred J. Waters, the husband of the plaintiff, died on the 15th of August, 1881. That at the time of his death, all premiums due on said policies had been paid, and the deceased and plaintiff had each performed and kept all the conditions of the policies. That the plaintiff more than ninety days before suit brought, to-wit: on the 13th day of September, 1881, gave notice and made proof of the death of the deceased, the insured, and demanded payment, which was refused and no part of the policies were paid, and she asks judgment for the sum of nine thousand dollars, the amount of the two policies, with interest thereon.

The defendant makes several defences by way of answer.

First, That the policies were not delivered and accepted by the insured party, and that the advance pre-
199 mium was not actually paid by Alfred J. Waters, or by the plaintiff at the delivery of the policies, or during the life of said Alfred J. Waters, as required by the terms of the contract.

Second, That the insured in the application made false answers to the third, ninth, twelfth and fifteenth questions, and that such answers were warranties, and if false or any one of them false, voids the policies.

Third, That the answers to the third, ninth, twelfth and fifteenth questions were wilfully false, and fraudulently made, and that they were material, and induced the Company to issue the policies, and but for them they would not have been issued.

Fourth, A general denial of the allegations of the petition, except as to the corporate characters of the defendant.

The plaintiff replies, first, by a general denial of the statements of the defendants' defences; second, she denies that the premium was not paid, but avers that it was agreed by the defendant through its agent that the advance premium was to be paid by the first day of September, 1881, and that prior to that time said Alfred J. Waters paid said premium by his promissory note to the defendant, which was accepted and a receipt in full given for the same signed by the President and Secretary of the defendant Company and delivered to Alfred J. Waters. That the note aforesaid after accepted and receipted for, after the death of the said Waters and before it became due, was returned to the plaintiff, and that the plaintiff on the 28th day of August, 1881, tendered to the defendant the full amount of said premiums which was refused

acceptance by the defendant Company. These pleadings for the issues of fact for you to determine under such directions of the Court as to the law applicable to them.

The plaintiff is required, in the first place to show that the insured and the plaintiff performed all the conditions of the policies. The payment of the advance premium being acknowledged to have been received, in the
200 policies, and also the possession by the insured of a receipt properly signed by the defendants' officers, shows such payment to have been made, subject to contradiction by the defendant, and this, with the admitted fact of the proper proof of the death, etc., would entitle the plaintiff to recover on these policies, in the absence of the establishment of one or more of the defences set up by the defendant. To make these policies valid and binding contracts upon the defendant, as well as upon the insured, they must have been delivered to the insured, and by him accepted in his lifetime. If, however, the policies, were given by Porter, the agent, to the insured, and the insured would not receive them until he had examined them, and if satisfactory on such examination would accept them and pay the premium or give his note therefor, then there was no delivery and acceptance, unless such assent of acceptance was communicated to Porter, the agent, by Waters sometime before his death. But if Waters gave notice, or did anything to indicate to Porter, the agent, that he had accepted them, then it was a proper delivery and acceptance at the time of such notice or action by Waters. It is important for you to carefully consider the evidence and ascertain precisely what the arrangement or agreement was between the insured and Porter, the agent, in regard to the delivery of the policies and the receipt of the Company for the pre-

miums, and the payment of the advance premiums how and when were they to be paid. Finding and settling the exact arrangement made at the time of the execution of the application, then you can properly apply the law to the facts so found.

The conversation between Porter and Waters in regard to the terms, and the time of the payment of the advance premium before the making of the application for insurance, and the delivery and acceptance of the
201 policies do not control the contract of insurance unless it appear that the same was so understood, and agreed to be the terms at the time of the making of such application, and the policies were delivered and accepted.

It is claimed by the defendant that Porter had no authority to deliver the policies and to bind the defendant in agreeing to a future payment of the advance premium, and that the policies are void for want of such delivery and payment.

I need not call your attention to the fact that this is a very important part of this case, and you should carefully consider the evidence bearing upon such instructions given you by the Court, and determine it in such a way as will satisfy you of having settled the questions of fact by evidence presented to you. The application for insurance made and signed by Waters contains this covenant and agreement: First, that it will constitute no contract of insurance until a policy shall first have been issued and delivered by said Company, and the first premium thereon actually paid during the continuance of the life of that proposed for insurance in the same condition of health as described in the appliction. By the terms of the policies issued thereupon, this application is made a part of the

contract of insurance, and together form the entire contract of insurance between these parties.

The policies also provide that the terms of the contract can only be modified or forfeiture waived by the defendant through its officers. Now under this contract, the payment of the advance premium is made a condition for the delivery and validity of the policies so as to make the defendant liable thereupon. This advance premium may be waived by the defendant company at the time of the delivery of the policies, and a credit given for its payment, and a delivery of the policies to the insured
202 under such waiver and extension of time for payment thereof, would make the policies valid contracts and binding upon the defendant.

Porter, the general agent of the defendant, who took the application and placed the policies in the posession of the insured, could not waive this advance payment of premium for the Company and deliver the policies without such payment, and stipulate with the insured to give him time to pay it, and such delivery would not make the policies binding upon the defendant. But the defendant acting through its officers having the control of its business, might delegate this authority to its agent, Porter, and if it did so, he would be authorized to deliver the policies without such payment of the advance premium, and stipulate for the time and manner of paying the same either in money or by note, the same, precisely, as the defendant company could do. This authority may be shown by direct and express direction to him either in writing or by parol. Or it may be shown by circumstances and the general course of business between the agent and the defendant, known at the time by the insured. It may be inferred from the general manner in

which, for a period before that time sufficiently long to establish a course of business, he had been allowed by the defendant to deliver policies without advance payment of premiums and make provisions as to a time within which they might be paid. And it may be shown and implied from the conduct or acquiesence of the controlling officers in such delivery of policies, or by their assent, or their ratification afterwards made, with a knowledge that it had been so done by their agent, Porter, this authority must be shown by the plaintiff by a fair preponderance that this agent did have such authority from the defendant company. You will see, then, that it is impor-
203 tant for you to carefully examine all of the evidence bearing upon this authority, and from it determine whether Porter was given such authority, under these directions, as authorized him to make such delivery of the policies, without such payment at the time of such delivery, and to stipulate for the future payment thereof. If you find that he had no such authority given him, then there was no legal delivery of the policies, and you would therefore find for the defendant. But if you find such authority was given him by the defendant, then you will proceed to the further examination of the case.

If the evidence shows that Porter, the agent, under such authority given him by the Company, agreed with the insured that he might pay the premium on or before the first day of September, then it might be paid, or be tendered to the agent, Porter, at any time before the time limited, even though that time should be after the death of the insured; and a delivery of the policies to the insured under this arrangement as to the time of payment, would make them valid policies and authorize this plaintiff to recover the amount of the policies, after hav-

ing shown the tender of the amount of the advance premium within the time limited by the agreement between Porter and the insured. The offer to pay the money for the premiums to Porter at his house would be a good tender to the Company, while he was the agent of the Company; and so would be a tender to pay at his office, or his usual place of business, to some one in charge of the office in his absence. If it appear from the evidence that Porter, as such agent having authority to do so, as I have before stated, agreed to take the note of the insured for the advance premium, payable at any given time, and had before delivered the policies to the insured, and also a receipt properly signed by the defendant, waiving the present execution of the note, and the insured exe-
204 cuted and delivered the note to Porter payable as agreed upon, and the same was accepted by Porter as payment of the premium before the death of the insured, that would be a payment of the advance premium and would make the policies binding obligations upon the defendant. But if Waters was, at the time he accepted the policies and executed and delivered the note, not in his usual good health as at the time of the application for insurance, but in bad health and in a dangerous condition as to his life, he could not in that condition accept the policies and execute and deliver the note so as to bind the Company, unless Porter, the agent, knew at the time of his condition, and did not object to it.

Now as to the second and third defences of the defendant, I direct you that the application of the insured, if one made, and the policies thereupon issued by the defendant and accepted by the insured constitute the contract between these parties, subject in its enforcement in Ohio as presently stated. As there was in fact but one

application made and signed by the insured and that one being for the five thousand dollar policy and issued first to the insured in which the insured made the answers charged by the defendant to have been false, it is necessary for the defendant to show that the four thousand dollar policy in suit was issued by agreement of the insured and the defendant's agent upon this application, which was regarded by the parties as an application for that policy as well as the five thousand dollar policy. If no application was made for the four thousand dollar policy, the last one issued, and the first one not adopted by it, then no defense can be made predicated upon the falsity of the answers in the original application, because then no answers were made to obtain that policy. If the insured however, agreed and understood that the applica-
205 cation for the five thousand dollar policy should be also an application for the four thousand dollar policy in suit, and should be the foundation upon which the four thousand dollar policy should be issued, and be a part of the contract, and the defendant agreed to it, then the original application may be regarded by you as a part of the contract in regard to the four thousand dollar policy as well as the five.

But if not so understood by the parties, then it is not a part of the contract for the insurance in the four thousand dollar policy. If you find that the agent, Porter, was instructed by the insured or Mrs. Waters, the plaintiff, or both, to procure the four thousand dollar policy upon the same application that had been made for the five thousand dollar policy, and the agent did communicate such instructions to the defendant, and in pursuance thereof the defendant issued the four thousand dollar policy and sent it to the agent, then the plaintiff is estopped from denying

that that application was the one on which the four thousand dollar policy was issued.

The four thousand dollar policy would be a binding contract on the defendant if issued without any application in writing being made by the insured for the insurance. In the absence of statutory provisions upon that subject, the law is that the insurance contract, being founded upon the answers of the insured therein made, and made warranties by the terms of the insurance contract, any false answer, whether material or not, will avoid the policy, and it makes no difference whether the insured knew the falsity of the answer or not, so that it be established that the answer was false. But in Section 3625 of the Revised Statutes of Ohio in force at the date of these policies, and in force at the present time, it is provided that no answer to any interrogatory made by the applicant in his application for a policy shall be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, and that it is material and induced the Company to issue the policy, and that but for such answer the policy would not have been issued. And, moreover, that the agent or Company had no knowledge of the falsity or fraud of such answer.

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I direct you that this statute applies to this action upon these policies, if not waived by the insured, Waters.

It may be raised by the party applying for and being insured, but it must be done by the express agreement or understanding of both parties that the provisions of the same are to be waived. That although it may appear in the application for insurance, or a paper attached to the policy, that the insurance contract should be interpreted or construed according to the laws of the State of Maine

and be regarded as made at the home office of the defendant in the State of Maine, it does not prevent the operation in the enforcement in this Court of the insurance contract of the provisions of this statute. If any such waiver of the statute be established by the defendant, then it must show clearly by the proof that the answers, or any one or more of them, were willfully false and fraudulently made; that they were material, and induced the Company to issue the policy, and that the agent or Company did not know of their falsity. A statement as to the existence of some fact, as a statement of facts, tending to induce the insurer more readily to assume the risk, or to induce the making of the insurance, or to fairly enable the officer to judge of the character of the risk, are all material statements; and if the answers are shown to be willfully false, fraudulently made and material, you may infer from the circumstances
207 that they induced the issuing of the policy, and that it would not have been issued without such answers. It must also appear that the agent of the Company had no knowledge of the falsity or fraud of the answer.

This want of knowledge may be inferred from the circumstances, and need not be expressly proven. The evidence must show that Waters at the time of the making of the answers knew the answers were untrue and made for the purpose of defrauding the defendant in obtaining the policies, in order to defeat this action under this defence. The defendant, to sustain this defence, undertakes to show by a fair preponderance of proof the false and fraudulent character of the answers, and their materiality, the knowledge of the insured of their falsity as before stated, and if the evidence satisfies you that it has done

so, the plaintiff cannot recover. If it fails to do so the plaintiff would be entitled to recover on this issue. The same remarks apply to the third defence, which charges the falsity of the answers to the questions within the provisions of the Ohio statutes, and accorning to its terms.

If you find on the first issue this want of authority to deliver the polices, and want of authority to extend the time for payment, that will terminate the case, and you will then find a verdict for the defendant. But if you find for the plaintiff on that issue, you will examine the evidence and determine whether the second or third defences of the defendant be true, and if you find for the defendant in either of them, it would be entitled to your verdict in its favor. If, however, you find on these issues in favor of the plaintiff, then you will render your verdict for the plantiff for the amount of the policies less the amount of the premium which was to be paid at the time of the insurance and delivery of the policies, with
208 interest on that amount, the amount of both these policies, and the amount of the premium which was to be paid, counting the interest from ninety days after the 13th of September, 1881, until the first day of the term of this Court.

Now take this case under these general instructions, and you will see that one of the very important questions is a question of fact that you are to determine in the light of all of the proof, after a careful examination and make such finding in regard to the truth of the evidence as will satisfy you of having correctly decided the questions of fact according to these general instructions of the Court as to the law governing and controlling the application of these facts, and return such a verdict as will have satisfied

you of having correctly decided this case in accordance with the law and the evidence.

Plaintiff objects to the admission of depositions used in the trial of this case into the jury room.

Objection overruled by the Court, and depositions allowed to go out with the jury.

Plaintiff excepts, and also excepts to the general charge.

It is admitted by counsel that the proofs of death were regularly and duly received by said Company.

J. N. HOYT,
Att'y for Plaintiff.
JOHN O. WINSHIP,
Att'y for Defendant.

The Court acceeded to the request of the counsel to be permitted to present exceptions after the jury retires.

And, therefore, defendant, by its counsel, then and there, pursuant to the aforesaid agreement, presented and filed the following exceptions to the charge of the Court, to the following several matters of law in such charge, and to said refusals of the Court to charge, as follows, towit:

209 1st. Defendant excepts to the refusal of the Court to charge the jury, as requested by defendants, "That there was no evidence to show the authority of Warren S. Porter as agent of defendant Company, to extend the time of payment of the first premium, or to give credit for the defendant to A. J. Waters for said first premium."

2nd. Defendant excepts to the part of the charge of the Court, that "It is important for you to consider the evidence and ascertain precisely what the arrangement or agreement was between the insured and Porter, the agent,

in regard to the delivery of the policies and the receipt of the Company for the premiums, how and when they were to be paid, finding and settling the exact arrangement made at the time of the execution of the application, then you can properly apply the law to the facts so found. The conversations between Porter and Waters in regard to the terms and time of payment of the advance premium before the making of the application for insurance and the delivery and acceptance of the policies, do not control the contract of insurance unless it appear that the same was so agreed and understood to be the terms at the time of the making of such application, and the policies were delivered and accepted"—which is excepted as a matter of law in such charge, and as misleading to the prejudice of defendant.

3rd. Defendant excepts to the following part of the charge, as given by the Court: "But the defendant, acting through its officers having the control of its business, might delegate this authority to its agent, Porter, and if it did so he would be authorized to deliver the policies without the payment of the advance premium, and stipulate for the time and manner of paying the same, either in money or by note, the same precisely as
210 the defendant Company could do,"—which is excepted to as a matter of law and misleading to defendant's prejudice, and as assuming an issue not raised by the pleadings or evidence, and contrary to the admissions therein contained.

Fourth. The defendant excepts to the part of the charge given to the jury, by the Court as follows: "This authority may be shown by direct and express direction to him either in writing or by parol; or it may be shown from circumstances and the general course of bus-

iness between the agent and the defendant, known at the time by the insured. It may be inferred from the general manner in which, for a period before that time sufficiently long to establish a course of business, he had been allowed by the defendant to deliver policies without advance payment of premiums, and make provisions as to a time within which they might be paid. And it may be shown and implied from the conduct or acquiesence of the controlling officers, in such delivery of policies or by the assent, or the ratification afterwards made with a knowledge that it has been done by their agent Porter," which is excepted to as matter of law and misleading, to defendant's prejudice, and as assuming an issue not raised by the pleadings, or evidence, and not sustained by any evidence in the case, and contrary to the admissions therein contained.

Fifth. Defendant excepts to the part of the charge given to the jury by the Court, as follows:

"But if you find such authority was given him by the defendant, there you will proceed to the further examination of the case. If the evidence shows that Porter, the agent, under such authority given him by the Company, agreed with the insured that he might pay the premium on or before the first of September, then it might be paid or tendered to the agent Porter, at any time before
211 the time limited, even though that time should be after the death of the insured; and a delivery of the policies to the insured under this arrangement as to the time of payment, would make them valid policies, and authorize the plaintiff to recover the amount of the policies after having shown the tender of the amount of the advance premium within the time limited by the agreement between Porter and the insured." Defendant excepts to

the same as matters of law and misleading to the jury, to the defendant's prejudice, and asassuming contrary to the pleadings and the evidence that there is some evidence to show that the agent, Porter, had such authority from defendant.

Sixth. Defendant excepts to that part of the charge given by the Court to the jury, as follows:

"If it appear from the evidence that Porter, as such agent, having authority to do so, as I have before stated, agreed to take the note of the insured for the advance premium, payable at a given time, and had before delivered the policies to the insured, and also a receipt properly signed by the defendant, waiving the present execution of the note, and the insured executed and delivered the note to Porter payable as agreed upon, and the same was accepted by Porter as payment of the premium before the death of the insured, that would be a payment of the advance premium, and would make the policies binding obligations upon the defendant. But, if Waters was, at the time he accepted the policies and executed and delivered the note, not in his usual good health, and in a dangerous condition as to his life, he could not in that condition accept the policies and execute and deliver the note note so as to bind the Company, unless Porter, as agent, knew at the time of his condition and did not
212 object to it," which is excepted to as matter of law and misleading, to the defendant's prejudice, and as assuming to raise an issue not raised by the pleadings or evidence, and contrary to the admissions therein contained, and as assuming contrary to the evidence that there is evidence to show that Porter, as such agent, had authority from defendant to take the note of the insured

for the first premium, and to agree to take such note at a future time.

And thereupon the jury brought in a verdict for the plaintiff assessing the damages in the sum of nine thousand nine hundred thirty-seven $\frac{55}{100}$ dollars.

And thereupon, and after verdict and before judgment, defendant filed his motion for an order of Court setting aside said verdict, and granting a new trial in the cause, which motion being heard, was overruled by said Court.

The defendants then and there excepted to said ruling and makes and tenders this its Bill of Exceptions, and asks that the same may be approved, signed and sealed by the Court, and made a part of the record of this case, which is accordingly done.

M. WELKER.

{Seal.}

Entered at foot of Original Bill of Exceptions by the judge the following memorandum, viz:
I do hereby certify that this Bill of Exceptions was left with me for inspection and approval at the term at which this case was tried.

(Signed) M. Welker
Dist. Judge U. S.
N. D. C.

212 *a* *INSURANCE POLICY NO. 73,549.*

Union Mutual Life Insurance Company of Maine.

Amount of Policy,	Age at Issue,	
$5,000.	46.	
	Premium,	Policy Number,
	$199.25.	73,549.

In consideration of application for this Policy of Insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the payment of the sum of One Hundred and Ninety-nine dollars and twenty-five cents, at the home office of the Company, at the date hereof, to be evidenced by the receipt of the Company, and of the payment of the like sum to be made at the said office on or before the fifteenth day of June in every year during the continuance of this contract, Does Promise Alfred J. Waters, of Cleveland, in the State of Ohio, to pay to said Alfred J. Waters the sum of Five Thousand Dollars (any indebtedness to the Company on account of this contract to be first deducted therefrom), at the office of the Company in Augusta, Maine, on the 15th day of June, in the year Nineteen hundred and twenty, or if said Al.

fred J. Waters shall die before that time, to pay said sum within ninety days after notice, and the hereinafter required proofs of death shall have been furnished to the Company at its said office, to Electa L. Waters, his wife, if she survive him, if not, then to his executors, administrators and assigns, upon the following conditions:

212 *b* *First*, If any statement made in the application for this Policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the Company shall be without liability under it.

Second, If any premium or instalment of a premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the Company shall be released from liability, except as hereinafter provided; and the only evidence of payment shall be the receipt of the Company, signed by the President or Secretary.

Third, If the said person upon whose death this Policy matures shall die in consequence of a duel; or of the violation of law; or by disease, violence or accident brought about by intoxication; or shall impair his health by narcotics or alcoholic stimulants; or shall have delirium tremens; or if, without the written consent of the Company, signed by the President or Secretary thereof, he shall pass, or remain beyond the limits of residence and travel, or shall personally engage in any of the occupations or employments which are specified on the back of this policy, the Company shall be released from all liability on account of this contract.

Fourth, It is hereby declared and agreed that the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the Company in this contract, but in

every such case the Company will, upon demand made, and the surrender of this policy, accompanied with satisfactory proofs of such death, within ninety days after its occurrence pay the net reserve upon it, held by the Company at the beginning of the year in which death occurs,

212 *c* calculated by the combined experience table of mortality, with interest at the rate of four per centum per annum, first deducting therefrom any indebtedness which shall have accrued to the Company on account of this contract.

Fifth, The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the President and Secretary of the Company, whose authority for this purpose will not be delegated; and it is further declared and agreed that in case the obligation of the Company under this contract be defeated by the failure of any of the considerations, or by the violation of any of the covenants or conditions recited or referred to herein all payments which shall have been made to the Company on account of this contract shall be forfeited to the Company.

Sixth, The proofs of the death by which this contract matures shall be furnished to the Company within one year after such death, and shall contain full and true answers under oath to the questions in the Company's blanks for proofs of death, relating to the life, health and death of the person in question; and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) the statement of the physician or physicians, if more than one, who attended the deceased during his last illness or within a year previ-

ous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker. If any of these statements be omitted, the necessity of the omission must be established and further proofs satisfactory to the Company, must be furnished, nor shall any suit against the Company under this contract be brought or action commenced, after one year from 212*d* the time when the right of action accrues; and if any such action or suit be brought after that time, the lapse of time shall be conclusive evidence against the claim.

Seventh, The provisions and requirements printed by the Company upon the back of this policy, are hereby referred to and accepted as a part of this contract, as fully as if they now were recited at length over the signature hereto affixed.

In witness whereof, the said Union Mutual Life Insurance Company has caused this policy to be signed by its President and Secretary, at its office in the City of Augusta, the sixteenth day of June, A. D., one thousand eight hundred and eighty-one.

J. P. CARPENTER, Secretary. JOHN E. DE WITT, President.

Form 224; *age* 46; *policy due at death, or age* 85.

PROVISIONS AND REQUIREMENTS REFERRED TO IN THIS POLICY.

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Provisions For Payment of Premiums.

All premiums are due at the office of the Company, in the City of Augusta, at the date named in the policy, but

at the pleasure of the Company suitable persons may be authorized to receive such payments at other places, but only on the production of the Company's receipt therefor, signed by the President or Secretary. No payment made to any persons, except in exchange for such receipt, will be recognized by the Company, or be deemed by either party as valid payment. If, for any reason, a premium is received after it becomes due, it is upon the express condition that the party whose life is thereby insured is, at the time of the receipt of such premium in good health, and of correct, sober and temperate habits; and, if the fact is otherwise, the policy shall not be put in force by such receipt, and, such receipt must in every case be understood by the parties as an act of courtesy on the part of the Company, and in no case whatever as constituting any obligation on its part to waive the payment of a future premium when due.

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In case any note, check or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium when due.

Commencement of Assurance Year and Balance of Year's Premium.

All premiums are payable annually in advance. When the premium is made payable in semiannual or quarterly instalments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the Company, and if any such payment be not made on or before the day it is due, the Company shall from that day be released from all liability under the contract except as hereinafter provided. When the premium is payable semiannually or quarterly,

in ascertaining the net value of the policy to determine the extension under the Non-forfeiture Law, there shall be deducted from the net value of the policy (assuming net annual premiums) the net premium for the unpaid quarterly or semiannual instalments for that year, which instalments shall not be considered as an indebtedness, but as forborne premiums.

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Policy not Varied by Usage.

It is especially declared and agreed that none of the clauses or conditions of this policy, or of the application therefor, shall be varied in their interpretation or legal effect by evidence of any usage or custom whatsoever.

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The Maine Non-forfeiture Law.

The Union Mutual Life Insurance Company, on the one part, by the delivery of this policy, and all persons who have, or hereafter may have, any interest therein, on the other part, by the acceptance thereof when delivered, each in consideration of the promise of the other, hereby promise and agree with each other that if the policy shall lapse for the non-payment of any premium, premium or other note, or interest thereon, after it shall have been in force three full years (no other condition of the policy having been violated) the rights of the parties shall be determined by, and each party be bound to abide by, perform, and accept the following provisions of the Law of the State of Maine, viz.:

(Takes effect after April 1, 1877.) Section 1. Every

policy of life insurance issued on and after the first day of April, in the year of our Lord one thousand eight hundred and seventy-seven, by any company chartered by the authority of this State, which may be forfeited for non-payment of premiums, including all notes given for premiums or interest thereon after it shall have been in force three full years, and which shall not contain provisions for a surrender value at least equivalent to the value arising under the terms of this act, shall, nevertheless, be continued in force to an extent, and for a period of time to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained according to the combined experience or actuaries' rate of mortality, with interest at four per centum per annum. After deducting from three-fourths of such net value any indebtedness to the Company, or notes held by the Company against the insured (which notes, if given for premium, shall then be cancelled) what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the policy and the assumptions of mortality, and interest aforesaid, but if the policy shall be an endowment payable at a certain time, or at death if it should previously occur, then, if what remains a aforesaid shall exceed the net single premium of temporary insurance for the balance of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium or simple endowment, payable only at the same time as the original endowment, and in case the life insured survives to such time, and the amount thus payable by the Company shall be determined according to the age of the party at the time of the lapse of the

policy and the assumptions of mortality and interest aforesaid.

Section 2. If the death of the life insured occur within the term of temporary insurance covered by the value of the policy as determined in the previous section, and if no condition of the insurance other than the payment of premium has been violated by the insured, the Company shall be bound to pay the amount of the policy, the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding, *provided*, however, that notice of the claim, and proof of the death shall be submitted to the Company, in the same manner as provided by the terms of the policy, within ninety days after the decease; and, *provided*, also, that the Company shall have the right to deduct from the amount insured in the policy the amount, compounded at seven per centum per annum, of all the premiums that had been foreborne at the time of the death, including the whole of the
212 *h* year's premium in which the death occurs.

But, instead of deducting one-fourth of said net value to obtain said net single premium, there shall be deducted the present value of the differences between the future premiums named in the policy and the future net premiums on said policy ascertained according to the rates of mortality and interest aforesaid; which deduction, in no event, however, shall exceed one-fourth of said net value.

And the ordinary *life* premium, not, however, to exceed five in number at age of issue, viz.: $39.58 at age 46, for each $1,000 insured, shall be deducted from the policy if it becomes a claim, as provided in the law, instead of the larger premium named in the policy.

The proof of death may be filed in all cases written one

year after such death, instead of within ninety days as provided in the law. So that, if no condition of the policy other than the payment of premiums is violated, the results named in the statement on the third page hereof shall be secured to the beneficiary, *provided*, all premiums paid on this policy have been fully paid in cash; but, if there remains any note, or other indebtedness against this policy at the date of lapse, it will be deducted according to the provisions of the Maine Non-forfeiture Law.

Policy due at death on page 85. Issued at age 46.

The Union Mutual Life Insurance Company.

The foregoing Policy, No. 73,549 issued under the Maine Non-forfeiture Law, provided none of the conditions thereof other than the payment of premiums has been violated, secures the results named in the following statement:

But, if there remain any divided additions in favor of the policy, or any indebtedness against the policy 212 *i* when it goes under the Maine Non-forfeiture Law, the results will be modified according to the provisions of that Law and the foregoing contract.

J. P. CARPENTER, Secretary,

JOHN E. DEWITT, President.

* * * * * *

IF THE PARTY WHOSE LIFE IS INSURED DIES

before discontinuing the payment of premiums, the whole of the sum insured, less any indebtedness due the Company on this contract, will be paid as a death-claim, provided no condition of the policy has been violated.

After the policy has been in force three full years, if

less than the full number of premiums agreed upon in this policy is paid, and the party whose life is insured dies after such discontinuance, and within the period of the extension secured by this contract under the Maine Non-forfeiture Law, the amount due as a death-claim, if no condition of the policy other than the payment of premium has been violated, will be as follows:

If death occurs the 1st year after lapse, and within the period of continued insurance, $957.65 will be paid on each $1,000 insured.

If death occurs the 2nd year after lapse, &c., &c. * *

If death occurs after the 5th year after lapse, and within the period of continued insurance, the deduction shall not exceed the five annual life premiums as aforesaid, with interest as provided in the Maine Non-forfeiture Law. (Endorsed) No. 73,519. Policy due at Death, or Age 85. Union Mutual Life Insurance Company of Maine. Insurance on the life of Alfred J. Waters for $5,000. Policy dated June 16th, 1881. Renewals due as follows.

Annually June 15th, $199.25.

Endowment matures June 15th, 1920.

212*j* *COPY OF PAPERS ATTACHED TO POLICY.*

Union Mutual Life Insurance Company of Maine.

$199.25. No. 73,549.

Received this 15th day of June, 1881, One hundred and ninety-nine and $\frac{25}{100}$ dollars from the owner of Policy No. 73,549, on the life of Alfred J. Waters for the annual premium due at above date, hereby continuing the insurance thereunder for twelve months from above date subject to all the provisions of said policy, and those endorsed hereon.

J. P. CARPENTER, *Secretary.*

Special attention is called to the back of this receipt.

Provisions for Payment of Premiums.—All premiums are due at the office of the Company, in the city of Augusta, Maine, at the date named in the policy; but at the pleasure of the Company, suitable persons may be authorized to receive such payments at other places, but only on the production of the Company's receipt therefor, signed by the President, or Secretary, or Assistant Secretary. No payment made to any person except in exchange for such receipt will be recognized by the Company, or be deemed by either party as valid payment.

If, for any reason, a premium is received after it becomes due, it is upon the express condition that the party whose life is insured is, at the time of the receipt of such premium, in good health, and of correct, sober and temperate habits; and if the fact is otherwise, the policy shall not be put in force by such receipt. And such receipt

must, in every case, be understood by the parties as an act of courtesy on the part of the Company, and in no case whatever as constituting any obligation on its part to waive the payment of a future premium when due.

COMMENCEMENT OF ASSURANCE YEAR AND BALANCE OF YEAR'S PREMIUM.

All premiums are payable annually in advance.
212 *k* When the premium is made payable in semiannual or quarterly instalments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the Company on account of the policy, and shall be deducted from the amount of the claim; and if any such payment be not made on or before the day it is due, the Company shall from that day be released from all liability under the policy, except as modified by the Non-forfeiture law, if the Policy is entitled to the benefits thereof, and no credit for surplus accumulated upon the policy shall be deemed applicable to the payment of any premium, unless the previous consent of the Company be obtained in writing.

Agents are not authorized to make any change whatever in receipts for premiums, or to waive a forfeiture or any condition of a policy or premium receipt; that can be done only by a writing signed by the President or Secretary.

Payment of Premiums:—In case any note, check, or draft given towards the payment of any premium shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium when due. The entire compact contained in the policy, the ap-

plication and the receipt taken together, shall be construed and interpreted as a whole, and in each of its parts and obligations according to the charter of the said Company, and the laws of the State of Maine, the place of the contract being expressly agreed to be the principal office of the Company, in the City of Augusta and in the said State of Maine.

Know all men by these presents, That we, the Union Mutual Life Insurance Company, of Maine, and Sidney S. Warner and Phineas M. Spencer, as sureties, are held and firmly bound unto Electa L. Waters in the full and just sum of twenty-two thousand dollars, to be paid to the said Electa L. Waters, her certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seal, and dated this 12th day of March, in the year of our Lord one thousand eight hundred and eighty five.

Whereas lately at a Circuit Court of the United States for the Eastern division of the Northern District of Ohio, and at the February term thereof A. D. 1885, in a suit depending in said Court, between Electa L. Waters and The Union Mutual Life Insurance Company of Maine, a judgment was rendered against the said The Union Mutual Life Insurance Company of Maine, and the said The Union Mutual Life Insurance Company of Maine having obtained a Writ of Error, and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Electa L. Waters, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such,

that if the said The Union Mutual Life Insurance Company of Maine shall prosecute its Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of The Union Mutual Life Insurance Company by

JOHN O. WINSHIP, Att'y in Fact, { Seal. }

SIDNEY S. WARNER, { Seal. }

PHINEAS M. SPENCER. { Seal. }

Approved by M. Welker, Dist. Judge U. S. N. D. Ohio.
Filed Mch. 12th, 1885.

United States of America, Northern District of Ohio, Eastern Division, ss.

I, Augustus J. Ricks, Clerk of the Circuit Court of the United States for said District, hereby certily the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said Court in the cause wherein Electa L. Waters is the Plaintiff, and The Union Mutual Life Insurance Company is the Defendant, as the same appears from the files and records of said Court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at my office in Cleveland, in said District, this first day of April, A. D. 1885, and in the 109th year of the Independence of the United States of America.

Seal of the Circuit Court, N. D. of Ohio.

AUGUSTUS J. RICKS,
Clerk.

124 U.S. 370.

127 U. S. 370

Supreme Court of the United States.

BRIEF.

Exparte HENRY C. CRAFT, *et al.*, Petitioners.

Your petitioners respectfully represent and submit the following:

That the cause herein considered is entitled on the docket record of the Supreme Court of the District of Columbia, the court below, as Mary F. Crist, Complainant, *vs.* Henry C. Craft, Philip A. Crist, and Albert A. Wilson, Defendants, Equity, No. 10036, Cal., No. 80.

That, upon June 11th, 1886, the above named complainant filed her bill in the said court below, against the above named defendants and appellants, which, substantially, contains the following allegations, averments, and prayers, namely:

That the defendant, Philip A. Crist, is the husband of the complainant; that they were married in 1869, and had living, at the commencement of the action, four children, the eldest of whom was sixteen, and the youngest was four years old; that the said husband, Crist, ill treated her, and, although having a comfortable income, furished but little towards the support of the complainant, and of their children; that, for three years prior to the filing of the bill, said defendant had treated her so cruelly as to endanger her life and health, and make it unsafe for her to live with him; that, in consequence of said acts of cruelty, and for the reasons of fault on the part of said defendant, the complainant, in order to avoid the public scandal of a divorce proceeding, entered into an agree-

ment of separation with said defendant on October 17th, 1884; that the complainant and her husband are living separate and apart from each other, and that said agreement is now in full force and effect; that complainant shows that said defendant has persistingly evaded and endeavored to evade the terms of said agreement; that, on May 18th, 1886, said defendant took forcible possession of his house and home, without the consent and against the will of complainant; that her said husband and the said defendant, Henry C. Craft, are now and have been for a long time confidential friends, and that said Craft is familiar with the details of said agreement of separation; that the complainant has been in possession of the chattels, hereinafter described, for a long period of time; that said Craft, in pursuance of conspiracy with her husband, on June 10th, 1886, filed at law, in this honorable court, a declaration of replevin, and had issued against complainant and her husband, jointly, a writ of replevin, directed to said defendant Wilson, as marshal, commanding him to take possession of all of the household furniture described in said agreement of separation; that complainant has no remedy at law whatever in the premises; that, therefore, for the above and other divers reasons and complaints, by said complainant in said bill, she prays that subpœna may issue against each of said defendants, to appear and answer the exigency of said bill; and that said Wilson, his agents, &c., "be forever enjoined from executing the said writ of replevin, and from recovering said chattels, and from delivering the same to either of said defendants, Craft and her husband; and that said Craft and Crist may be jointly and severally enjoined and forever restrained from receiving said chattels under said proceedings, and from attempting in any manner to obtain possession or control of the same;" that "the title of said goods and chattels be vested in

complainant," and "such further relief as the nature of the case may require."

The bill, substantially as aforesaid, was filed on the same day with and *just after* the filing of the declaration in said action at law, namely, June 11th, 1886; and, on the *very same day*, and, presumably, *just after*, the filing of the bill, a '*restraining order*' was made and issued, *without notice to the adverse parties*, by the judge of said supreme court sitting in 'special term,' which order was "returned as served," *simultaneously* with the subpœna, on June 12th, 1886, the *day after* said 'special injunction' was issued.

The *answer* of the defendant *Craft* to said bill was filed on June 18th, and *that* of the defendant *Crist* on July 7th, 1886.

After due proceedings had by said court in 'special term,' as fully shown by the docket files and record of said court, on April 11th, 1887, the usual form of decree of perpetual injunction, "in accordance with the prayers of said bill," was ordered and declared, with the exception of an appended paragraph, namely, "*At the trial*, the court *excluded* all the testimony of the complainant, *except* that portion of it *as against the defendant Craft*, which showed that he was aware of the *existence and terms* of the articles of separation between the plaintiff and her husband."

An appeal was duly taken, from said court in 'special term' to the court in 'general term,' on April 14th, 1887; and, after a partial hearing in open court—*in the absence of the original record from the files of the court*, and against the *urgent plea of the same* by the counsel for the appellants in the premises—, the briefs and the 'printed statement of record' being *afterwards* duly submitted, the decree of the court in 'special term' was affirmed by said appellate court, on November 7th, 1887, and the opinion of the court, in writing, was delivered by the Chief Justice thereof.

Your petitioners, therefore, claim that the more especial grounds, among many others, for the allowance of the appeal to the Supreme Court of the United States in said cause, are as follows, namely:

1. That the said appeal was duly sought in said court for this District, *in open court* and under its prescribed practice therefor; and that said appeal was *formally denied in open court*—on November 28th, 1887—, on the stated ground that "this cause did not come within the statute so as to give any right of appeal;" and that said denial was thus formally maintained, notwithstanding that the *second* section of the statute now in force, namely, the Act of March 3d, 1885, c. 355 (23 S. at L., 443.), was duly and urgently pressed upon the attention and consideration of said court, in direct connection with the aforesaid claim, *then and there made*, "that the authority of the proceedings had, and upon which the said decree depended, were challenged and drawn in question."

2. That said denial of the right of appeal, in the premises, is in effect the denial of the right, through 'due process of law,' to fully and properly show, in the Supreme Court, *where* and *how* is "drawn in question the validity of an authority exercised under the United States;" and furthermore, that the said denial is made *in full view of the record* of the *aforenamed cause*, in which fully appear the very questions raised and discussed and the pleadings thereupon heard, *which*, in order that said *appellate court below* should arrive at proper and just conclusions upon which to found its decree of affirmation, *must have been the indispensable precedents* to that very decree; which, in its turn, *after being discussed in open court*, in relation to said *right of appeal* on the part of said defendants and appellants, *became the direct and veritable cause* of the claim to said right, and of this brief of your petitioners. See in this connection, section 846, R. S. D. C.; sections 690,

691, 692, 699, 705, 706, 922, 983, 999, 1007, 1012. R. S. U. S.; and also, the decisions of U. S. Supreme Court in Wilson *vs.* Marsh Co., 2 Peters, 245, Sil. 1; Davis *vs.* Packaed, 6 Peters, 41, Sil. 3; and Crowell *vs.* Randell, 10 Peters, 368.

3. That, as said supreme court of this District is *presumed* to "possess the same powers and exercise the same jurisdiction as circuit courts of the United States"—see sections 750, 760, 762, R. S. D. C.—; and also, *presumed* to have its "forms and modes of proceeding in suits in equity" in strict "conformity to and in accordance with the statutes, the principles, usages, and rules of courts of equity," and "subject to regulation by the Supreme Court"—see sections 913, 917, 918, R. S. U. S., and Noonan *vs.* Braley, 67 U. S., 499—; it appears from *the said record* in the court below, among other proceedings had which "draw in question the validity of an authority exercised by said court of the United States," that there proceeded from said court in 'special term'—that is, when "*any one* of the justices may hold *a district court*"—, a 'special injunction' in the nature of a 'restraining order,' but which in effect was an unwarranted, not to say invalid, obstruction *deliberately thrust in the way* of 'due process of law' in an *action of replevin*, in which the *jurisdiction of the court had already been attached*—see Scripts 1 and 2 of exhibit A of said original record—, and while the party plaintiff—now one of the appellants herein—was *waiting in open court for an opportunity to proceed* in said action at law. Therefore, as will clearly appear from said record—see Scripts 6 and 7 of said exhibit A—, the said 'restraining order' was issued by said 'justice while holding a district court,' not only *without notice to the adverse party*—not even constructively—, but directly in contravention of the prohibitory statutes thereupon, namely, sections 718, 719, 723, R. S. U. S.,

and Equity Rules of the Supreme Court, 11, 16, and 55; also, see in Hollingsworth *vs.* Barbour, 4 Peters, 466, Sil. 2; McVeigh *vs.* U. States, 11 Wallace, 259; and Windsor *vs.* McVeigh, 93 U. S., 274.

4. That the said decree was affirmed by said appellate court for this District, therefore, declared by "an authority exercised under the United States," and was an affirmation of the said invalid order of the court in 'special term'; consequently, the said *decree of affirmation* was also in contravention of the statutes, in relation to the rules of equity in force upon courts of the United States, namely, sections 92, 93, 753, R. S. D. C., and Par. 11, S. 2, c. 69, Act of February 27th, 1877 (19 S. at L., 240.); and also, decisions in Smith *vs.* M'Ivor, 9 Wheaton, 532; Osborne *vs.* Bank Co., 9 Wheaton, 739, Sil. 5 and 9; Harding *vs.* Handy, 11 Wheaton, 103, Sil. 1; Vattier *vs.* Hinde, 7 Peters, 252, Sil. 5 and 7; Dunn *vs.* Clarke, 8 Peters, 1, Sil. 3; and Hipp *vs.* Babin, 19 Howard, 271.

5. That said decree of affirmation was thus declared, after "due proceedings had by said authority," whereby the *original and real question at issue joined*, namely, the *legal ownership* of the personal property *then in the custody of the marshall*, and brought directly before the court by the said declaration—see Script 2 of said exhibit A—, thus attaching *prior* as well as *original* jurisdiction, was effectually *put out of court*, and an entirely new and foreign issue was *peremptorily substituted*, entirely *without any offer of proof* in support of the allegations *of the bill of substituted issue*, whereby, not only were all the firmly settled rules of equity, in relation to this cause, completely subverted, but the said decree, declared and affirmed upon the *substituted issue*, absolutely prohibited and prevented the proper and *only solution* of the very question originally at issue, and as yet remaining unanswered. See Gettings *vs.* Burch's Ad., 9 Cranch, 372; Thompson *vs.* R. R. Co.,

6 Wallace, 134; Rees *vs.* Wutertown, 19 Wallace, 107; Seitz and Seitz *vs.* Mitchell, 94 U. S., 580; Crim *vs.* Handley, 94 U. S., 652; 1 Story Esq. Jur., Sec. 61; and Sedgwick on Stat. and Const. Law, p. 90.

6. That, in accordance with well known and settled maxims of equity jurisprudence, such as "Equity follows the law;"—"In equal equities, the law must prevail;"—"He who seeks equity must do equity;"—if the aforesaid action at law *had been allowed* to take its usual, proper, and adequate course through the court *to which it was legally attached* by said *prior* as well as *original* jurisdiction, *the whole and sole question* at veritable issue in this *entangled* case, would have been brought to prompt, complete, and clear conclusion, upon which judgment could have been undoubtedly rendered, which, being established upon the well settled principles of *justice as well as equity*, would, presumably, have been acceptable to all parties concerned: instead of which, as *appears clearly from and in the record*, "an authority was exercised under the United States," to constrain and enforce a conclusion by decree, which, *under the semblance of equity*, resulted in the complete eclipse, not to say, extinguishment of rights conferred by law.

7. The following is the concise analysis of the aforenamed cause, as fully supported by the said docket record in the court below, namely: This suit commenced, originally, in an action at law through writ of replevin, in which the then plaintiff and now defendant, H. C. Craft, sought to obtain possession of certain "household effects," which he, said Craft, had bought, in good faith without notice and for valuable consideration, from the husband of said complainant, Mary F. Crist. Jurisdiction of the competent court for this District had already attached in said *original* suit, by service of summons, the seizure of said chattels by the marshal, the filing of the declaration

in the case, and the appearance of the parties concerned in the court.

Immediately after the above proceedings were had on the law side of said court in 'special term,' the bill of the complainant Mary F. Crist, in the above entitled suit in equity was filed—That is on the same day with and *directly after* the filing of said declaration —; and, *before* any notice had been served upon the adverse parties—that is to say, the plaintiff, Craft, and the co-defendant and husband, Crist, in said action at law —, and *before* the return was made of the service of the writ of subpœna under said bill, a 'special injunction was issued by the said court in 'special term'—that is, while "one of said justices was holding a district court"—, to restrain and prohibit all further action in the said cause on its law side, to which the jurisdiction of the court had, as aforesaid, already attached.

After due proceedings had in said suit in equity, in which said suit at law was arbitrarily put out of court, a decree of 'common' or perpetual injunction was declared by the court in 'special term,' in "accordance with the prayers" in said bill. From this decree, appeal was made to said court in 'general term,' which appellate court affirmed said decree of the court below, with costs. The opinion of the court in said cause, together with the said decree of affirmation by said court, was read and formally declared by the Chief Justice thereof, on November 7th, 1887.

The suit at law commenced on June 9th; summons was served and said effects were attached on June 10th; and said declaration was filed and appearance of plaintiff entered on June 11th, 1886.

The said bill in equity was filed, also, on June 11th, 1886, *presumably*, before the said 'special injunction' was issued, and *certainly* before any notice was given to the

adverse parties, as said subpœna and injunction were *returned* as having been "served together on June 12th, 1886."

Again, the said declaration had been filed and said appearance entered before the opening of said court on June 11th, 1886; while the said 'special injunction' was the *very last proceeding* of a *very short session* of court, before adjourning for the day, on the said June 11th: this raises the strong presumption that the suit in equity had not been "entered on the docket as pending in the court," when said 'special injunction' was issued; consequently, said bill of complaint could not have been legally before the court.

All of the above is, therefore, respectfully submitted to this Honorable Court for its consideration, with the firm conviction on the part of your petitioners, that its decision will be made in complete accordance with all the law and equities in the premises.

R. H. STEELE,
Counsel for Petitioners.

Dated January 16th, 1888.